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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. ~~979~~. 935

J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR, PETITIONERS,

against

EDWARD B. WESLEY.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SAMUEL W. MELTON,
Attorney for Petitioners.

HENRY N. OBEAR,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 919.

J. E. TINDAL AND J. R. BOYLES, PLAINTIFFS IN ERROR, PETITIONERS,

against

EDWARD B. WESLEY.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief of Samuel W. Melton, Counsel for Petitioners.

STATEMENT.

The action herein was begun in the circuit court of the United States for the district of South Carolina by Edward B. Wesley, as a citizen of the State of New York, against J. E. Tindal and J. R. Boyles, as citizens of the State of South Carolina, for the possession of "the lot of ground in the city of Columbia on which stands the building known as 'Agricultural Hall.'" (Record, p. 38.)

At the April term, 1893, of the said court, at Charleston, the trial was had before a jury and verdict rendered for the plaintiff, Edward B. Wesley. Appeal was duly taken by the defendants, Tindal and Boyles, by writ of error from the United States circuit court of appeals for the fourth circuit, heard at Richmond, Va., October 8, 1894, and judgment rendered affirming the judgment below 5th February, 1895. Upon this as a final judgment the petitioners submit their petition to this honorable Court for a writ of certiorari, to be directed to the clerk of the said United States circuit court of appeals for the fourth circuit, requiring him to certify to this the Supreme Court of the United States the entire record and proceedings in the said cause; and they, with their said petitions, submit a certified copy of the said record and proceedings for the review and determination of this Court. On the 9th day of March, 1895, notice of the motion was duly served upon Messrs. Lyles & Muller, counsel for the respondent, as follows:

IN THE SUPREME COURT OF THE UNITED STATES.

Ex Parte J. E. TINDAL and J. R. BOYLES, *In Re* J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,
vs.
EDWARD B. WESLEY, Defendants in Error.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

To Messrs. LYLES & MULLER,
Attorneys for Edward B. Wesley,
Defendant in Error in the Above-stated Case:

You will hereby take notice that on the verified petition of J. E. Tindal and J. R. Boyles, plaintiffs in error in the case, and a certified copy of the entire record in said entitled cause in the circuit court of appeals for the fourth circuit,

which is hereto attached, the undersigned, as attorneys for J. E. Tindal and J. R. Boyles, will move the Supreme Court of the United States, at its present session, on Monday, the 1st day of April, A. D. 1895, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for the allowance of a writ of certiorari, to be directed to the clerk of the United States circuit court of appeals for the fourth circuit, requiring him, for said court, to certify to the Supreme Court of the United States the entire record and proceedings in the case of "J. E. Tindal and J. R. Boyles, plaintiffs in error, *vs.* Edward B. Wesley, defendant in error," for review and determination by the Supreme Court.

SAMUEL W. MELTON,
Attorney for Plaintiff in Error.

COLUMBIA, S. C., *9th of March*, 1895.

Service of the within notice and a copy of the verified petition of J. E. Tindal and J. R. Boyles, plaintiffs in error, and a certified copy of the record of the within-entitled case in the circuit court of appeals for the fourth circuit, hereto attached, duly accepted at Columbia, S. C., on the 9th day of March, A. D. 1895.

LYLES & MULLER,
Attorneys for E. B. Wesley.

This notice has been duly filed in the office of the clerk of this Court.

In the assignment of errors three questions of law were presented to the circuit court of appeals, pages 32–35:

1. Whether in an action of ejectment the defendants below may set up the defense of fraud on the part of the plaintiff in the contract of sale of the premises in controversy so as to avoid the deed under which the plaintiff claims title.

2. Whether the defendants are proper parties to the action.

3. Whether this action is "in effect a suit against the State."

Upon each of these questions the ruling of the trial court is sustained (43, 44), and as to each the petitioners submit that there is material error in the decision of the circuit court of appeals of such nature as to warrant the writ of certiorari prayed for. The court of appeals say, pages 43:

"The first assignment of error relates to the testimony of "W. H. Lyles, on cross-examination, tending to show that "the plaintiff below, Edward B. Wesley, had made the pur- "chase of the premises with the secret intention of paying "the deferred installments of the purchase-money in a value- "less kind of paper issued by the State, known as 'Blue "Ridge Railroad bond scrip.' The court below refused to "allow the evidence to go to the jury, and this ruling is "assigned as error."

The sole object of the purchase of this property by the defendant in error was to bring about an issue in the United States court to try the validity of the "bond scrip" issued in the name of the State, which had been declared void by the supreme court of the State as "bills of credit" (*State ex rel. vs. Comptroller General*, 4 S. C., 185), and constituted the subject-matter of the cases familiar in this Court (*Williams vs. Hagood*, 98 U. S., 72, and *Hagood vs. Southern*, 117 U. S., 52). In both cases Edward B. Wesley was interested, holding a "block of this scrip" (117 U. S., 55), and endeavored by bill in this Court to enforce it as a valid obligation of the State. Unless the State should consent to waive its right of exemption from suit, it was the purpose of this transaction

to appropriate the property here in controversy without payment of the credit portion of the purchase-money.

This the defendants in the trial court sought to contend was a fraud upon the State and upon the jurisdiction of this Court sufficient to avoid the deed. Whether this position should have been sustained is not now the question. Under the ruling of the trial court the facts were not brought out, and the defendants below were not permitted to impeach the validity of the deed on the ground of fraud—the court of appeals holding that the payment of the first installment of the purchase-money and the execution of the bond and mortgage for the deferred installments making "the transaction a perfect and complete one to confer title" (p. 43). This, whether the transaction was fraudulent or not. Denying the right of the defendants below to contest the validity of the deed, the Court assumes that it was a "valid deed of conveyance" and adjudges accordingly. This, conversely, is as if, in the *U. S. vs. Lee*, 106 U. S., the trial court had refused to allow the Government to introduce evidence of title under the purchase at the tax sales. We submit that the petitioners had the right to test the question in the trial court, and subject their defense to searching judicial inquiry.

On page 43 the court of appeals say: "The third and principal ground assigned as error is a denial of the jurisdiction "of the court below to try the cause, because of the allegations "in the pleadings that the premises in dispute were, at the "date of plaintiff's demand for possession and have been "ever since, the property of the State of South Carolina, in "actual public use; that the defendants below were officers

"of the State and in custody of the premises only as such, "and that they have no right, title, interest, or estate of any "kind to or in the said premises."

This assignment contains the second as well as third propositions of law which we propose to discuss, the second being whether the defendants in the trial court were proper parties to the action. In the second bill of exceptions, page 31, Judge Simonton states as follows:

"At the close of the testimony the defendants entered a "motion to dismiss the complaint on the plea to the jurisdic- "tion of the court contained in the second defenses set up in "the answers of the defendants herein, and on the evidence "introduced to sustain the plea. The defendants contended "that they were mere custodians and care-takers of the prem- "ises, not in possession or having any interest therein, and "were not proper parties to the action."

In the statement of the court of appeals is a copy of the statute of the State of South Carolina prescribing the relation of J. E. Tindal to the property in controversy as secretary of state, as follows:

"The secretary of state shall take charge of all the prop- "erty of the State, the care and custody of which is not other- "wise provided for by law. He shall hold the same subject "to the directions and instructions of the commissioners of "the sinking fund."

From the statement it also appears, same page, that "there "was no provision of law for other custody of the subject "of this suit than that of the secretary of state, J. E. Tindal.

"The immediate custody of the building was in a watch-
"man, J. R. Boyles, appointed by Tindal, whose duty it was
"to watch, guard, and take care of the premises. He is
"one of the defendants below."

The term "custodian" is not used in the statute. In all cases where "the care and custody" is not provided for by law the secretary is required to "take charge" of it. He is a mere care-taker, whose duty it was only to take care of the premises, keep them in repair, and lease portions of the building to occupants as tenants, "but holding under the "directions and instructions of the commissioners of the "sinking fund."

The petitioners contend that their relations are not those of *possession* in the technical sense of the term as intended in the law of ejectment: that of the secretary does not differ from the relation of a real-estate agent, whose business is often to take care of, keep in repair, and lease the property of his client; that of Boyles is the bald relation of a watchman. Neither of them resided on the premises or was in any sense an occupant thereof. It may here be remarked that it was not the office of the secretary of state or his watchman to deliver possession of the premises to any one except tenants or occupants. There were three tenants in possession of portions of the building: "The railroad commis-
"sioners had their room there, and I had engaged two rooms
"to J. W. Bowden, editor of a paper, for which he paid
"$2 per month, and the Weather Bureau had their office
"in the building." (Record Statement, p. 42.)

From the statement it also appears, page 40, that when possession was demanded of the petitioner Boyles the witness, Mr. Lyles, was referred to the secretary of state, who, under

the statute, was without power to deliver possession without the instructions of the commissioners of the sinking fund. Demand was not made upon the commissioners or upon any one having authority or any of the tenants or occupants having actual possession of several portions of the building.

On the face of the record, at the institution of the suit in the circuit court the jurisdiction depended entirely "upon the opposite parties to the suit being citizens of different States," as averred in the complaint, page 2. There being other issues involved, plaintiff in error elected by writ of error to submit the case for review and determination to the circuit court of appeals for the fourth circuit. Under the act of March 3, 1891, section 6, entitled "An act to establish circuit courts of appeals," etc., the decision of the circuit court of appeals was final; and under the terms of this section of the act it became "competent for the Supreme Court of the United States, by *certiorari* or otherwise, to require the case to be certified to the Supreme Court for its review and determination."

In the course of subsequent proceedings in the case issues were developed, as has been stated, challenging the jurisdiction of the Court on other grounds, and a question may possibly arise whether in the case at bar the question of jurisdiction depended entirely upon the diverse citizenship of the parties. In "The Colorado Central Consolidated Mining Co. *vs.* Turk, 150 U. S., 138, this Court determined a similar question in terms directly applicable here. It was contended that "the suit really and substantially involved

" a controversy only to be determined by reference to a Fed-
" eral statute, and that the jurisdiction existed on that ground
" and did not depend entirely upon the diverse citizenship
" of the parties." In delivering the opinion of the Court Chief Justice Fuller says, page 142:

" To maintain this proposition, it is contended that refer-
" ence may be made to the entire pleadings, the evidence, or
" the rulings of the court below. This view, however, ignores
" the settled doctrine that the inquiry in cases such as this
" into the jurisdiction is limited to the facts appearing on the
" record in the first instance. This has often been so held in
" the enforcement of the inflexible rule which requires this
" Court in the exercise of its appellate power to deny the juris-
" diction of courts of the United States in all cases where such
" jurisdiction does not affirmatively appear in the record on
" which it is called upon to act." * * *

Referring to the subsequent issue, it is said: " The jurisdiction had, however, already attached and could not be affected by subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented. We are of the opinion that the judgment of the circuit court of appeals was final under the sixth section, and that the writ of error must be maintained."

Rouse *vs.* Letcher, 15 Supreme Court Reporter, 266; Hardenburg *vs.* Ray, 14 Supreme Court Reporter, 305, and Aztec Mining Co., 14, 236, are to the same effect.

ARGUMENT.

First Proposition.

In the decision of the court of appeals it is held that "the suit he (the plaintiff below) brought for the possession "involved no other inquiry than whether his first payment "had been made, whether a valid deed of conveyance had "been executed, and whether he had further complied with "the terms of sale relating to the bond and mortgage for "the future installments. What might have been his secret "intentions with respect to the deferred payments was a "question foreign to his suit for possession of the premises "to which he had become entitled, and all evidence in re-"gard to such intentions was properly ruled out."

The validity of the deed and the good faith of the alleged compliance with the terms of sale, put in issue by the defense, and thus assumed, these questions at the same time being held to be foreign to the issue. This presents the proposition we have stated squarely. The defendants in the trial court were entitled to impeach the deed for fraud, under the familiar rule that in order to recovery in this action plaintiff must show perfect title paramount, while defendant may introduce under the general issue any evidence of any facts tending to avoid the deed under which plaintiff claims title. (1 Chitty Pl., No. 507; 2 Estee Pl., sec. 3759; Bliss Code Pl., sec. 328; Pom. Rem., secs. 670, 671–679; *Gregg vs. Sayer*, 8 Pet., 2441; *Swaze vs. Burke*, 12 Pet., 11; *McCall vs. Carpenter*, 18 How., 297; *Blanchard vs. Brown*, 3 Wall., 245; *Lombard vs. Cowhan*, 34 Wis., 487; *Brown vs. Freed*, 43 Ind., 253; 2 Pom. Eq. Jur., sec. 872.)

In the argument below the defendant in error cites *Field vs. Seabury*, 19 How., 323–333, and White *vs.* Bumley, 20 How., 235, to the point that as to "a grant or patent for land" a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant." The deed under which claim of title is made by defendant in error is not a grant or patent in the sense intended by these cases. The State acquired title from private parties, and the deed was made by the commissioners of the sinking fund as such and not in the name of the State.

The latter case lays down the general proposition that "a court of law has concurrent jurisdiction with a court of "equity in matters of fraud." This is sustained by the long line of authorities we have cited.

Lombard vs. Cowhan, 34 Wis., 487: "If the deed to B. "(plaintiff) was void by reason of fraud, that would be a "legal defense to an action of ejectment, and the question of "fraud would be one for the jury under a general denial in "the answer." (*Gregg vs. Sayer*, 8 Pet., 244.)

Swaze vs. Burke, 12 Pet., 11: It is held in all jurisdictions that a court of law has concurrent jurisdiction with the court of chancery in cases of fraud.

2 Pom. Jur., sec. 872: "Fraud, in some of its phases, has long been an occasion for the exercise of jurisdiction both at law and in equity. The various reliefs on the ground of fraud which are possible from the nature of the legal and equitable modes of procedure are the following: At law, * * * 3, defensive relief, where the party sets up fraud as a defense, and thereby defeats any action brought to enforce the apparent obligation."

In the decision of the court of appeals it is said (p. 44): "A case rarely arises in the courts more fully within the terms of a ruling decision than is the case at bar within the meaning and tenor of the language of the Supreme Court in the case of *Stanley vs. Schwalby*, confining and explaining the decision in Kaughman *vs.* Lee."

In these cases the validity of the title and question was subjected to patient and searching judicial inquiry, and the very right of the matter was judicially determined. Here, in the case at bar, this is assumed in one breath, and in another held to be foreign to the suit. Here is a difference as to which the cases do not appear to be "on all fours."

In the statement of the circuit court of appeals (p. 39) it is said that "this suit is by complaint and is in South Caro-"lina a statutory action equivalent to and a substitute for "the common-law action of ejectment." To this it may be added that the action remains subject to the rules and principles of law relating to the ancient action of ejectment. (*Geiger vs. Kaigler*, 15 S. C., 262; *Verdier vs. R. R. Co.*, 15 S. C., 476, 478; *Lyons vs. Holmes*, 19 S. C., 406, 412.)

Second Proposition.

This question is certified in the second part of the bill of exceptions (p. 31) and is stated in the third assignment of error (p. 33), and was elaborately discussed before the court of appeals. In the decision of Judge Hughes, following a careful statement of the facts bearing upon this question, there is nothing said save that "the defendants below were "officers of the State and in custody of the premises only

"as such, and that they have no right, title, interest, or "estate of any kind to or in the premises."

We have now to insist, with great deference, that the petitioners were not proper parties defendant to the action.

In such actions the rule is of universal application that the defendant must be in *actual* possession, whether as claiming adverse title or as an occupant or tenant under a claimant or landlord. Occupancy and tenancy mean the same, in either case *actual* possession being necessary. (Consult 2 Rap. and L., pp. 892, '3; Bouvier Dic., 258.) A tenant is one who holds or possesses lands or tenements by any kind of title in fee for life, for years, or at will. (Bouvier, p. 573.) Under these definitions the petitioners at the commencement of the action were neither occupants nor tenants, and the Court was therefore without jurisdiction of the parties in interest or of the subject-matter of the action. So far as our research goes, the authorities sustain this proposition by an unbroken current. They answer to the reason of the thing. The petitioners disclaim all interest or estate in the premises and have no higher relation than the mere day laborer in his master's garden, and neither had nor pretended to have the power to surrender possession of the property. To subject a person holding such relations to property to the costs and damages of a suit for the possession of it would be an intolerable hardship. Recurring to the analogy in our statement, we insist that it would be equally as logical to bring an action in ejectment against a real-estate agent employed by the owner to take charge of, keep in repair, and lease his real property. It is impossible that judgment on such an action can be effectual either as to the person or as to the subject-matter of the action. It is no answer to say

that judgment was entered in the cases of Kaughman *vs.* Lee and Stanley *vs.* Schwalby. In each of these cases the relation is not the same as in the case at bar. In each the defendants below admitted possession. In the technical sense they occupied the property, and in neither case was the question mooted, the defense insisting that they were in lawful possession. In this essential particular also these cases are not "on all fours" with the case at bar.

Under the title "Ejectment," in 6 Am. and Eng. Ency., 245*c*, it is said: "The rule at present in regard to parties defendant requires the plaintiff in the action of ejectment to make all those parties who have or claim an interest, ownership, title, or right of possession in or to the demanded premises to be made parties, to bind them upon the question of title, and as against such persons as are not made parties and who ought properly to have been joined, no title is established by the judgment. As a rule, the action should be brought against the party in actual possession of the premises claimed, or in case there is no one in actual occupancy or there is a tenant in possession it may be brought against such tenant or the one exercising acts of ownership and claiming title in the premises." Again, same volume, 245*m*: "It must be proved as against the defendant named in the action in ejectment that he was actually in possession when the suit was commenced, unless he be one admitted to defend in the place of another."

The rule is thus stated in Tyler on Ejectment, 411: "Except in some cases provided by statute, the defendant in ejectment must be the tenant in possession of the premises in dispute, and ejectment will not lie against a person who is, to all intents and purposes, out of possession. It must

therefore appear that the person or persons on whom the declaration and notice were served was or were tenants in possession at the time the service was made."

The same high authority, on page 623, repeats the rule thus: "If there be an actual occupant, he must be named as defendant in ejectment. If the premises are actually occupied, it is immaterial who claims to be the owner."

7 Lawson on Rights, Remedies, and Practice, sec. 3708: "It must be shown that the defendant is in actual possession of the property in question."

In South Carolina it was at one time held that the action would lie against a trespasser not in possession at the time of the action. This was overruled in *Anderson vs. Lynch*, 37 S. C., 575, where the court say: "But it is urged that it is error to hold that the action could not be maintained unless the defendant, in person or through another, was in possession at the time the action was brought. It is true that the case of *Binda vs. Benbow*, as at first reported in 9 Rich., 15, did hold that it is sufficient to prove a trespass within ten years before the commencement of the action. We think this judgment was hastily rendered, and, considering that it is not sustained either by principle or the current of authorities, we feel constrained to overrule it, which is done."

Garnett vs. Garnett, 7 Mon. (Ky.), 545, a case under the old form of action: "No principle is better settled than that to enable a plaintiff in ejectment to recover, he must prove the defendant to be possessed, unless the defendant is made so for the purpose of defending the possession of some other. If, therefore, the lessor's title had been made out in proof the plaintiff would not on account of lack of evidence of possession in the appellants have been entitled to a verdict against the appellants."

Again, in *Pope vs. Prendergast*, 1 Marshall, 122: "A plaintiff in ejectment cannot succeed unless he shows the defendants to be in possession."

Redfield vs. Utica R. R. Co., 5 Barb., 54: After a learned discussion of the history of the action for the recovery of lands from the ancient real action to the action under the codes of civil procedure, the court say: "Under all the changes of practice and the purposes to which the action is applied, it has only been permitted to be brought against some person in possession exercising acts of ownership and claiming title."

The cases in California are full to the point.

Hawkins vs. Reichert, 28 Cal., 534, 537: This was an action in ejectment. Verdict for the defendant. The court say: "The doctrine is very clear that as the action lies only to recover the possession of the premises wrongfully withheld from the plaintiff, it must be brought against the person who, at the commencement of the action, withholds the possession—that is to say, it must be brought against the occupant." Cases cited: *Garner vs. Marshall*, 9 Cal., 270; *Burke vs. Water Co.*, 12 Cal., 403; *Dutton vs. Warschauer*, 21 Cal., 609; *Fogarty vs. Sparks*, 22 Cal., 148; *Owen vs. Fowler*, 24 Cal., 192; *Lyle vs. Rollins*, 25 Cal., 440.

In *Klinck vs. Cohen*, 13 Cal., 623: "In ejectment the suit must be brought against the terre-tenant or party in possession." Cites "Adams on Ejectment," 572.

Taylor vs. Crane, 15 How. Pr., 358: "If the premises are actually occupied, the occupant must be made a defendant. This was the old rule, and the case of *Doe vs. Stanton* (2 B. & Al., 371) turned upon the point whether the defendant was in the situation of servant to another or in the possession as servant."

Grundy vs. Hatfield, 18 Atl.* Rep., 186 (R. I.): "The action must be brought against the actual occupant or tenant in possession."

Conversely and in support of the affirmative proposition, that the petitioners were not proper parties to the action, authority is equally full and conclusive; and this proposition may be maintained, even though the defendants were actual occupants, if their occupancy be held as the agents or employés of another.

In South Carolina the rule is laid down in Davis *vs.* Clancy, 3 Mc., 422:

"There is a species of tenancy in this country which is "very unusual, if not altogether unknown, in England. It is "not unusual for persons owning tracts of unoccupied lands "to place agents on the premises for the purpose of holding "possession for them and to protect the lands from depreda-"tion. Such a tenancy is not considered as conveying any "right to the tenant. Such a possession is considered the "possession of the landlord and not of the tenant, notwith-"standing he may be allowed the privilege of cultivating a "part of the land for his own use."

1 Estee, Pl., 165: "The general rule is that ejectment can be maintained only against the real party in possession, although he is not personally on the premises, but may be in possession through servants and employés. *A mere party in charge for others is not an occupant* (italics ours). *Sedg. and Wait* on Trial of Title to Land, sec. 242: "A servant or employé claiming no title or interest to himself or any right

*Abbreviation for Atlantic.

to the possession is not usually liable to an action of ejectment. Such an employé is not an occupant within the meaning of the rules of law governing ejectment. *He is acting under the control of another, and it is only in another right that he occupies the premises.*"

Ibid., sec. 243: "On this principle it has been held in the supreme court of Illinois that a clergyman who preached in a church edifice under the direction and employment of a religious corporation was not liable to an action of ejectment. As well, say the court, might the claimant of a farm bring his action against the men employed to cultivate the farm. Even in England a parson claiming the right to enter and perform divine service has been held not to have a sufficient title to be admitted as a defendant. It has been decided in New York that where the property in controversy was a church edifice occupied and used by a society for the purpose of religious worship it was to be deemed to be in the possession of the corporation, and ejectment would not lie against the trustees or other officers of the church."

Shaver vs. McGraw, 12 Wend., 558, syllabus: "Where a party *not in the actual occupation* of premises as distinguished from the exercise of acts of ownership is found in the cultivation of and working upon the premises and an action of ejectment be brought against him, it is competent to him to show that he labors upon the premises as a mere servant of another; and if the jury find his allegation to be true, and that he is not the tenant of the premises, he is entitled to a verdict in his favor."

In *Dunton vs. Warschauer*, 21 Cal., 609, it may be readily seen that a mere servant or employé may, in one sense, have the occupation of the premises of which he has con-

trol and in which he claims no right; but his occupation is the occupation of his employer within the meaning of that term as employed when treating of the action of ejectment. Conceding that Klatt was personally present and living in the house, it was still a question of fact for the court to determine whether he was there in his own behalf or only or solely as the employé of the defendant." See Polack *vs.* Mansfield, 44 Cal., 36, 39, to the same effect.

Chiniquy vs. Bishop of Chicago, 41 Ill., 148: "Persons who are in the possession of land merely as servants or employés of the party claiming title adversely are not occupants of the land within the meaning of the ejectment law and an action cannot be maintained against them."

People vs. Albrecht, 11 Abb. Pr., 97: "A person may occupy land as he may do any other act, either in person or by an agent or servant, and in the latter case the possession and occupation of the agent or servant will be that of the principal, and it cannot be in both at the same time."

This case is not in conflict with that of U. S. *vs.* Lee, U. S., 172. There the property was in the occupancy of the officers of the United States Army, commanding and resident on the premises. *Ambrecht's* case, an able discussion of the proposition for which we contend, is to the point that the action could not be brought against a common soldier in charge under superior officers. On the same principle the action cannot be maintained against Boyles or against Tindal, acting under superior officers, the commissioners of the sinking fund.

If our position be well taken, it may be doubted whether the suit could be maintained against the commissioners of the sinking fund. The result is that the defendant is re-

duced to the necessity of bringing his action against all or, possibly, any of the occupants or tenants, else the State itself becomes a necessary party.

THIRD PROPOSITION.

Whether this action is in effect a suit against the State. (Bill of exceptions, p. 31; third assignment of error, pp. 33, 34.)

(We beg leave here to refer to the statement of the court of appeals in the last paragraph of page 39 as follows: "The "State of South Carolina is not a party to the suit in any "form; she did not come into court to make suggestion of "her title to the premises in dispute, and for that purpose "only, as was done in Kaufman *vs.* Lee. She left her rela- "tions to the property to be gathered exclusively from the "pleadings and the evidence."

By reference to the statement of the proceedings in the circuit court of appeals, pp. 37-'8, this entry will appear: "October 3, 1894.—Motion of plaintiffs in error to certify "questions of law to the Supreme Court of the United States "and Exhibit Transcript of Record, Supreme Court of the "United States, October term, 1894, No. 796, The State of "South Carolina, plaintiff in error, against Edward B. Wes- "ley, filed Sept. 10, 1894, filed."

Upon the files of the Supreme Court will be found the transcript of record, "The State of South Carolina, plaintiff in error, *vs.* Edward B. Wesley, filed September 10, 1894," from which it will appear that the State, by the attorney general, did go into the trial court and make suggestion of

her title to the premises in dispute, and for that purpose only, as was done in Kaufman *vs.* Lee. At the hearing in the court of appeals, by leave of the court a certified copy of this transcript of record was exhibited to the court of appeals and there filed. This appears on page 38 of the Transcript of Record, C. C. A.

In the decision, page 44, the court held: "The case at bar "is practically and in principle on all fours with that of "United States *vs.* Lee, or Kaufman *vs.* Lee," 106 U. S., 196, and is ruled by the decision in that case, and in Stanley *vs.* Schwalby, 147 U. S., 508.

With the utmost deference we propose to contend that the cases are on all fours in no particular save in the fact that each is an action in ejectment, and that the case now at bar, except in the character of the action, is one of wholly novel impression. Of the three propositions which we have presented not one is to be found in Kaufman *vs.* Lee or *Stanley vs. Schwalby*, and in no particular is the difference more marked than in the fact that while in the one the doctrine involved is derived from the common law of England, in the other, the case at bar, the issue is determined by an imperative mandate of the Constitution of the United States:

"The judicial power of the United States shall not be con-"strued to extend to any suit in law or equity commenced or "prosecuted against one of the United States by citizens of "another State or by citizens or subjects of any foreign State."

In discussing this provision of the Constitution, this Court will give it a liberal construction. *In re* Ayers, 123 U. S., 443, 505: "To secure the manifest purpose of the constitutional exemption guaranteed by the eleventh amendment

requires that it shall be interpreted not literally and too narrowly, but fairly and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In accordance with this rule the doctrine in *Osborne vs. Bank*, 9th Wheat., 738—affirmed in Davis *vs.* Gray, 16 Wall., 293; Bond *vs.* Newcomb, 92 U. S., 53; the Virginia coupon cases, 114 U. S., and U. S. *vs.* Lee, 106 U. S., 196—as to parties has been abandoned, and it is now established that to have the protection of the eleventh amendment the State need not be named as a party to the record, and the right to sue officers of the State as individuals in matters concerning the property and rights of the State is confined to cases where, acting upon a void authority, they have made actual, aggressive, and forcible seizures of property. (*Louisiana vs. Jumel*, 107 U. S., 711; *Cunningham vs. Macon*, 109 U. S., 440; *Hagood vs. Southern*, 117 U. S., 52; *In re Ayers, supra.*)

It is not denied that in a line of cases this Court has declined to enforce the eleventh amendment, and as to this point these cases have not been overruled: *Osborne vs. Bank, supra; Davis vs. Gray, supra; Board of Liquidation vs. McComb*, and "the Virginia coupon cases," *supra.* The doctrine upon which these cases go must be acknowledged. The full force of the eleventh amendment was conceded, but as all the provisions of the Constitution and the law made with it must be construed *in pari materia*, the eleventh amendment could not be interpreted so as to nullify them by protecting a State in the forcible, violent, and wanton seizure of property. These cases, however, have not the semblance of analogy to the case at bar. Here there was no actual or violent trespass, no seizure of property, no unconstitutional statute of the State involved, no violation of the Constitu-

tion or laws of the United States. Technically a tort, the real cause of action is in the refusal of the commissioners of the sinking fund, for whatever reason, to deliver possession of the property in question to the defendant in error in accordance with their contract.

Essentially the case at bar involves a matter of contract between the commissioners as agents of the State and the defendant in error. The mere form of the action does not affect the real character of the controversy, and we submit that this contention should have been decided as if it were an action upon contract. It is an attempt at law, under rigid technical rules, to enforce the specific performance of contract, the object being to compel the delivery of possession, the right to which arises solely out of contract. To such an action in equity the eleventh amendment would be interposed without question. The action in the last analysis is designed in purpose and effect to enforce a contract right by invoking the precedent of a case in which the eleventh amendment was not considered, which involved a principle of the common law wholly within the judicial discretion of the court, to be disregarded as the justice of the matter may require.

The petitioners do not defend under the color of an unconstitutional and void law of the State. Their authority is derived from statutes the validity of which cannot be questioned, nor are they now in litigation in behalf of property of the United States. They do not seek protection by interposing a principle of the common law either of England or of the States. On the contrary, they are claiming the

protection of the Constitution of the United States, to which this Court will yield unquestioning obedience unless it be clearly shown to be inapplicable. Time need not be wasted in this presence in argument to the point that the Constitution of the United States will here be enforced without consideration of the right or wrong of it.

It may be questioned whether the principle of the English common law answers to right reason, and by the same sign we might cast ridicule upon this provision of the Constitution, if we dare. We see the force of the assertion that in England, where the petition of right may go to the Crown, the principle has gone into disuse, and that here, where the individual citizen is king, it ought not to prevail. Mr. Justice Davis, in U. S. *vs.* Lee, says:

"As no person in this Government exercises supreme executive power or performs the public duties of a sovereign, "it is difficult to see on what solid foundation of principle the "exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the "general doctrine of publicists that the supreme power in "every State, wherever it may reside, shall not be compelled "by process of courts of its own creation to defend itself from "assaults in those courts.

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective "or individual, are not bound to give way to a sentiment of "loyalty to the person of a monarch. The citizen here knows "no person, however near to those in power or however "powerful himself, to whom he need yield the rights which "the law secures to him when it is well administered. When "he in one of the courts of competent jurisdiction has estab-

"lished his right to property there is no reason why deference "to any person, natural or artificial—not even the United "States—should prevent him from using the means which "the law gives him for the protection and enforcement of that "right."

With such prepossession of opinion, it is not surprising that the Supreme Court should hesitate to interpose this principle to sustain the United States in a grievous wrong and forcible injury to the right of the citizen in the property at Arlington. But can it be said that the court would have held the same opinion if it had been confronted by a solemn and imperative mandate of the Constitution of the United States? Can this mandate be put aside simply because it does not agree with our conceptions of what is right or expedient? We are not taking refuge behind an unconstitutional statute of a State. We are not in violation of any law of the United States which can operate to avoid the application of the protection we invoke. We are simply holding up the impenetrable shield of the supreme law of the nation.

In discussing the second proposition we contended that the action must be brought against the tenants in actual possession. It is due to candor to say, however, that even in such cases the State would be a necessary and indispensable party. At the outset, in U. S. *vs.* Peters, 5 Cranch, 115, Chief Justice Marshall, delivering the opinion of the Court, said: "The State cannot be made a defendant to a suit brought by an individual, but it remains a duty of the court

of the United States to decide all cases brought before them by citizens of one State against citizens of different States, *when the State is not necessarily a party defendant.*" The proposition is thus made dependent upon the condition we have italicized.

In Cunningham *vs.* Macon and Brunswick Railroad Company, 109 U. S., 446, this proposition takes positive form. The Court say: "Whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rule which governs its procedure, to grant the relief sought, it will refuse to take jurisdiction."

The Osborne case to the contrary, it is now well settled that an action, though in form against a person who is an officer of the State, whether he be sued personally or officially, if it be in fact a suit directed against the property of the State, cannot be maintained, even though the State is not made a party. (Louisiana *vs.* Jumel, 107 U. S., 711; Cunningham *vs.* Macon, 109 U. S., 446; Hagood *vs.* Southern, 117 U. S., 52; "*In re* Ayers," 123 U. S., 443.)

Upon the principles of these cases, in this as well as in other particulars, our argument rests.

Louisiana vs. Jumel, supra, was a proceeding in mandamus to compel the fiscal officers of the State to apply moneys in the State treasury to the payment of the coupons of certain bonds of the State in accordance with the contract between the State and the holders of these bonds. After the issue of the bonds payment was refused in obedience to the requirements of an ordinance of Louisiana adopted in constitutional convention forbidding such payment. A bill was

also filed against the officers for an injunction forbidding them to recognize as valid said ordinance and forbidding them to oppose the full execution of the act which had authorized the issue of the bonds and which had been ratified by a constitutional amendment. Here was a case in every material particular the same in principle as the case of Osborne *vs.* Bank of the United States. But it was held:

"1. That the ordinance forbade the payment of the interest due January, 1880, and withdrew from the officers of the State the means of carrying her contract into effect.

"2. That the execution of the contract cannot be enforced nor the relief sought be awarded in a suit to which she is not a party, but which is brought against officers who are merely obeying the positive orders of the supreme political power of the State.

"3. That at the time the bonds were issued or since no statute or judicial decision authorized a suit against Louisiana in her own courts, nor can she be sued in the courts of the United States by a citizen of another State.

"4. That the money in her treasury is her property, held by her officers, not in trust for her creditors nor as their agents, but as her servants, and that the courts cannot control them in the administration of her finances and thus oust the jurisdiction of the political power of the State."

The Court endeavored to distinguish this case from Osborne *vs.* Bank and the cases following the lead of it, but after considering the dissenting opinions of Justices Field and Harlan it seems hard to avoid the conclusion that the spirit and energy of these cases are seriously weakened if not destroyed, although in terms those cases are not overruled. The Court denied the jurisdiction in obedience to the eleventh amendment, and in the concluding paragraph of the opinion, page 728, say:

"When a State submits itself without reservation to the "jurisdiction of a court in a particular case that jurisdiction

"may be used to give full effect to what the State has by its "act of submission allowed to be done; and if the law permits "coercion of the public officers to enforce any judgment that "may be rendered, then such coercion may be employed for "that purpose; but this is very far from authorizing the "courts, when a State cannot be sued, to set up its jurisdiction "over the officers in charge of the public moneys, so as to "control them as against the political power in their admin- "istration of the finances of the State. In our opinion, to "grant the relief asked for in either of these cases would be "to exercise such a power."

In Cunningham *vs.* Macon, Mr. Justice Miller, after laying down the proposition that a State cannot be sued without its consent, says: "This principle is conceded in all cases, and "whenever it can be seen that the State is an indispensable "party to enable the court to grant the relief sought it will "refuse to take jurisdiction." In the Ayers case it is held that it is not conclusive "of the principal question in this "case that the State of Virginia is not named as a party de- "fendant. Whether it is the actual party, in the sense of the "prohibition of the Constitution, must be determined by a "consideration of the nature of the case as presented on the "whole record." In Pennoyer's case it is said: "The Court "will look behind and through the nominal parties on the "record to ascertain who are the real parties to the suit."

Hagood *vs.* Southern and Hagood *vs.* Williams, *supra*, were heard together. Both were suits brought in the circuit court of South Carolina to enforce the obligation of the contract between the defendant in error and the State, evidenced by this same "revenue bond scrip." The case now before the Court is a fourth attempt to acquire jurisdiction of this

question in the United States court, to which should be added the case of The State *ex relatione* Shiver *vs.* Comptroller General, in the supreme court of the State. In all of these cases the interest of the defendant in error here may be traced. His active participation is part of the record of Hagood's cases. This is the syllabus:

"When a suit is brought in a court of the United States "against officers of a State to enforce the performance of a "contract made by the State, and the controversy is as to the "validity and obligation of the contract, and the only "remedy sought is the performance of the contract by the "State, and the nominal defendants have no interest in the "subject-matter of the suit, but defend only as represent-"ing the State, the State is the real party against whom the "relief is sought, and the suit is substantially within the "prohibition of the eleventh amendment to the Constitu-"tion of the United States. Louisiana *vs.* Jumel, 107 U. S., "711, affirmed and applied."

From the opinion we quote (117 U. S., 52). The application to our case is more obvious than is the opinion in the Jumel case:

"The controversy," says Mr. Justice Matthews, page 67, "in which the validity and obligation of the scrip are in-"volved, is the subject of the present suits. The complain-"ants as holders of this scrip, in behalf of themselves and "of all other holders choosing to take part, are seeking to "obtain by judicial process its redemption by the State ac-"cording to the terms of the statute in pursuance of special "taxes pledged to that purpose, as they claim, by an irre-"pealable law, constituting a contract protected from viola-

"tion by the Constitution of the United States; and such "are the decrees which have been rendered according to the "prayer of the bills. These suits are accurately described "as bills for the specific performance of a contract between "the complainants and the State of South Carolina, who are "the only parties to it; but to these bills the State is not "in name made a party defendant, though leave is given to "it to become such if it chooses, and, except with that con- "sent, it could not be brought before the Court and be made "to appear and defend; and yet it is the actual party to the "alleged contract the performance of which is decreed, the "one required to perform the decree, and the only party by "whom it can be performed. Though not nominally a "party to the record, it is the real and only party in inter- "est, the nominal defendants being the officers and agents "of the State, having no personal interest in the subject- "matter of the suit and defending only as representing the "State, and the things required by the decrees to be done "and performed by them are the very things which, when "done and performed, constitute a performance of the con- "tract by the State. The State is not only the real party to "the controversy, but the real party against which relief is "sought by the suit, and the suit is, therefore, substantially "within the prohibition of the eleventh amendment to the "Constitution of the United States, which declares that "the "judicial power of the United States shall not be construed "to extend to any suit in law or equity commenced or prose- "cuted against one of the United States by citizens of an- "other State, or by citizens or subjects of any foreign State."

Then, on page 71, the Court say, concluding the opinion:

"The defendants in the present cases, though officers of

"the State, are not authorized to enter its appearance to the "suits and defend for it in its name. The complainants are "not entitled to compel its appearance, for the State cannot "be sued without its consent, and the court cannot proceed "to the determination of a cause and controversy to which "the State is an indispensable party without its presence. "This, however, the circuit court has in fact done, and its "decrees undertake to dispose of the matter in controversy "and enforce the judgment of the court against the State, "through its officers, in a suit to which it is not a party. "The suggestion that it has had the opportunity and the "invitation to appear is immaterial, for it has a constitu- "tional right to insist on its immunity from suit."

It is submitted that this case controls the case now before the Court. Whatever be the form of the action, *the fact remains that the decision of this Court against plaintiffs in error must be enforced by a judgment against the property in controversy in the possession of the State, through its officers, in a suit to which it is not a party. This is in effect placing the strong hand of the court upon the State itself.*

"*In re* Ayers," 123 U. S., 443, is an elaborately considered case in the same line. It is only permitted to quote part of the syllabus, after referring the Court to pages 501, 503:

"Whether a State is the actual defendant in a suit within "the meaning of the eleventh amendment to the Constitu- "tion of the United States is to be determined by a consid- "eration of the nature of the case as presented by the whole "record, and not in every case by reference to the nominal "parties of the record. (Osborne *vs.* Bank of the United "States, 9 Wheat., 738, 857, explained and limited.)

"If a bill in equity be brought against the agents and "officers of a State, the nominal defendants having no per- "sonal interest in the subject-matter of the suit and defending "only as representing the State, and the relief prayed for is a "decree that the defendants may be ordered to do and per- "form certain acts which when done will constitute an al- "leged performance of an alleged contract of the State, it is "a suit against the State for a specific performance of the "contract within the terms of the eleventh amendment of "the Constitution, although the State may not be named as "a defendant; and, conversely, a bill for an injunction "against such officers and agents to restrain and enjoin them "from acts which it is alleged they threaten to do in pur- "suance of a statute of the State, in its name and for its use, "and which, if done, would constitute a breach on the part "of the State of an alleged contract between it and the com- "plainants, is in like manner a suit against the State within "the meaning of that amendment, although the State may "not be named as a party defendant."

If it be held that the petitioners are proper parties to the action and in possession of the property in controversy, it must be admitted that, as it clearly appears, they hold as agents of the State, and under the familiar rule their possession is the possession of the State. It appears, then, that the action directly involves property held in possession by the State under claim of title; that the real issue involved is whether the contract under which the plaintiff claims title is effectual to that end, thus bringing into controversy, under

the guise of an action in ejectment, a matter arising wholly out of a contract alleged to have been made between the plaintiff and the State; that the remedy sought must be enforced directly against the property claimed by the State in possession, so as thereby to enforce the State to comply with its alleged contract to deliver possession—the writ of execution commanding the marshal of the district forcibly to oust the State and "deliver the property to the said Edward B. Wesley" (p. 29).

As matter of law, we submit that to such an action the State is an indispensable party, and therefore the action is in effect a suit against the State.

In reference to the proposed seizure of property claimed by the State and in her possession and the delivery of it to the plaintiff by direct judicial process, we submit that the cases of *Louisiana vs. Jumel* and *Cunningham vs. Macon and Brunswick R. R. Co.* are conclusive of argument of the defendants in error here submitted. The controlling fact is that, without regard to the question of title, the State is in possession of the property and has been so, peaceably and continuously, for years.

Cunningham's case was by bill to foreclose a second mortgage against the Macon and Brunswick Railroad Company, the first mortgage having been previously foreclosed by a sale of the property of the company to the State, then at the time of the suit holding it in possession by its agent. The remedy sought was to "set aside the sale to the State, to be let in as prior in lien, and for other relief directly affecting the property." The bill assailed the validity of the sale. It was dismissed by the circuit court upon demurrer, in the decision of which the validity of the sale and

of the title was assumed, the opinion going upon the hypothesis that the title of the State was valid.

In the case now before the Court the facts as to the question of title are almost identical. We have to repeat that the deed under which plaintiff claimed was assailed by the defendant. True, this case went upon verdict, but under direction of the Court in the absence of the facts assuming that the deed is valid. So that this Court is not informed where the right of the controversy rests, whether the deed is valid or void.

The opinion of the Court in *Cunningham's* case is a clear, concise exposition of the law on this topic, rendered by the justice who delivered the opinion in *Kaufman vs. Lee*, in terms which, we respectfully submit, cannot be reconciled with the authorities upon which that decision was rendered.

The Court say, 109 U. S., 457:

"In the case now under consideration the State of Georgia "is an indispensable party. It is in fact the only proper "defendant in the case. No one sued had any personal in- "terest in the matter or any official authority to grant the "relief asked.

"*The State is in the actual possession of the property and the "Court can deliver no possession to the purchaser. The entire "interest adverse to the plaintiff in this suit is the interest of the "State of Georgia in the property of which she has both the title "and possession.*" (Italics ours.)

The point we desire to emphasize is that the State is in possession of this property, and this Court can deliver no possession to the purchaser. The exigency of the writ of possession requires that the Court shall lay its hands upon the property and wrest it from the possession of the State

upon process more violent and more directly in conflict with the Constitution than in either the *Cunningham* or the *Jumel* case. We submit that no case can occur more clearly in development of the proposition that this case at bar is "in effect a suit against the State."

We submit that the right or wrong of the case is not here the controlling consideration. The principles of abstract justice have nothing to do with it. The question is solely whether, right or wrong, justly or unjustly, the jurisdiction is inhibited by the Constitution of the United States, which, whatever it may be, is of its own force always right in the law.

Mr. Justice Miller remarks, in *Cunningham's* case, that in regard to both classes of cases (one involving rights claimed on behalf of the United States; the other, rights claimed by the State) that "the questions raised have rarely been free "from difficulty, and the judges of this Court have not always "been able to agree in regard to them, nor is it an easy "matter to reconcile all the decisions of the Court in this "class of cases."

We crave pardon if we venture to comment upon principles announced in former cases preceding *Louisiana vs. Jumel*. The logic is beyond our power of comprehension. In order to ascertain whether the Court has jurisdiction it must take jurisdiction and ascertain the right and justice of the matter. If the right be found with the plaintiff, then the United States courts have jurisdiction. If the justice of the case be with the State, the Court has not jurisdiction and never had. This, we with the utmost deference submit, is in the face of the imperious mandate of the Constitution of the United States.

We submit that the true test will be found in *Cunningham's* case, in which Mr. Justice Miller holds "that the general principle that a State cannot be sued without its consent is conceded in all cases, and whenever it can be seen that the State is an indispensable party to enable the Court to grant the relief sought, it will refuse to take jurisdiction."

The question whether the writ shall be granted rests in the discretion of this Court.

In *Lau Ow Bew, petitioner*, 241 U. S., 583, 587, a rule is laid down that "it is only when questions of gravity and "importance are involved that the power of this Court to "require a case in which the judgment and decree of the "court of appeals is made final, to be certified can be "properly invoked. The inquiry upon such application, "therefore, is whether the matter is of sufficient importance "in itself and sufficiently open to controversy to make it the "duty of this Court to issue the writ applied for in order "that the case may be reviewed and determined as if brought "here on appeal or writ of error."

In re Woods, petitioner, 143 U. S., 202, 206: "But in the "interest of jurisprudence and uniformity of decision, to "use the language of the eminent jurist and statesman who "had charge of the bill, provision was made under section "6 for such supervision on our part as would tend to avert "diversity of judgments and guard against inadvertence of "conclusion in controversies involving weighty and serious "matters."

We submit that the case at bar is one of exceeding gravity and importance, involving the relations between the Federal courts and the several States, demanding always the most careful and elaborate consideration, outweighing in importance any issues that can arise in mere matters of international jurisprudence. If the suit were waged between private parties the questions involved would be worthy of exceptional consideration by this Court; but here the property rights of a State are directly involved, the State is in effect the real party in interest, and the judgment will be of great importance in its effect and in its far-reaching consequences. The eminent dignity of the cause will of itself commend it to the most earnest and elaborate consideration of this Court.

In one aspect the case involves the enforcement of a provision of the Federal Constitution ordained for the protection of the rights of the States. Except when the necessity existed for construction *in pari materia* with other provisions, this the eleventh amendment has been kept inviolate. In the case at bar there is no issue involving other provisions, of the fundamental law, and the question is presented squarely, discard the amendment and consider the issue as if it involved solely the principles of the common law. All of the later decisions of this Court, notably the *Jumel* and *Cunningham* cases, are directly in point conclusive of the principles at issue in the case at bar; and yet the court of appeals disregards them all and relies upon the precedent of a case without the slightest analogy to the case at bar. Aside from the gravity of the case, in the interest of jurisprudence and in order to secure uniformity of decision and "such supervision as would tend to avert diversity of judg-" ments and guard against inadvertence of conclusion in a

"controversy involving weighty and serious matters," it is respectfully submitted that the writ should issue.

At the hearing before the court of appeals the petitioners presented our second proposition, that they were not proper parties to this action. This was elaborately discussed there as here. Whether it is worthy of consideration this Court will determine. The issue was not irrelevant and, in our view of it, is conclusive of the case, being sustained by a long and uninterrupted array of authority; yet in reference to it not one word appears in the opinion of the court. With all due deference, it is submitted that this is one of the "inadvertences of conclusion" against which the writ of certiorari is intended to guard, and that if no other reason be found, the petitioners are entitled to the writ on this ground.

It will be remembered that this is the first case of ejectment against real property in the possession of the State—the first to which the constitutional inhibition is applicable. The Court will consider whether this fact does not add to the gravity and importance of the case.

SAMUEL W. MELTON,
Counsel for Petitioners.

Office Supreme Court, U. S.
FEB 3 1897
JAMES H. McKENNEY,
Clerk.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 231.

J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,

vs.

EDWARD B. WESLEY, Defendant.

ON THE RETURN TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

SAMUEL. W. MELTON,
Counsel for Plaintiffs in Error.
WILLIAM A. BARBER AND
HENRY N. OBEAR,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 231.

J. E. TINDAL and J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY, DEFENDANT IN ERROR.

Brief of Argument for Plaintiffs in Error: on Return to the Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fourth Circuit.

SAMUEL W. MELTON, Counsel for Plaintiffs in Error.

WILLIAM A. BARBER and HENRY N. O'BEAR, of Counsel.

STATEMENT.

This action was brought in the Circuit Court of the United States for the District of South Carolina, on the 13th of February, 1893, on the complaint of Edward B. Wesley, a citizen of the State of New York, against J. E. Tindal and J. R. Boyles, citizens of the State of South Carolina, for the possession of a "a lot of land in the city of Columbia, in "the said State, with the buildings and improvements there-"on, known as Agricultural Hall."

The complaint alleged title to the premises in the said Edward B. Wesley, by a deed of conveyance from one J. B. Johnston to the State of South Carolina; then by deed of conveyance, dated 16th of February, 1892, from the Commissioners of the Sinking Fund of the State of South Carolina to one J. W. Alexander, "to hold the same in trust for the "use of the plaintiff (Edward B. Wesley), to have and possess "the same and to enjoy the profits, and in trust to convey the "same to the plaintiff, his heirs and assigns, or such person as "he might direct and appoint; then, upon the request of the "said plaintiff, the said J. W. Alexander, by deed dated the "11th of February, 1893, conveyed the said premises in fee "simple to this plaintiff." (Transcript of Record, p. 3.)

The answer of J. E. Tindal, for a first defense, set up the general denial; and for a second defense averred that this plaintiff was, at the times mentioned in the complaint, the Secretary of State of the said State of South Carolina; that the premises were and have since continued to be the property, and in the possession, of the said State and in actual public use; and that "this defendant has no right, title, in-"terest, or estate, to or in the said premises; but that in pur-"suance of law the same is in his custody as such Secretary "of State." (Record, p. 5.)

The answer of J. R. Boyles sets up the like defenses—disclaiming all right, title, interest or estate to or in the said premises; and that, by the employment of the said Secretary of State, this defendant is engaged, on behalf of the said State, in watching, guarding and taking care of the premises. (Rec., p. 6.)

At the April Term, 1894, of the Circuit Court of the United States for the said District, at Charleston, this cause came on for trial before a jury. Verdict as follows: "We "find for the plaintiff the possession of the land in dispute as "described in the complaint. J. M. Prioleau, Foreman, April "7, 1894." (Rec., 26.)

On writ of error, the case was duly removed into the United States Court of Appeals for the Fourth Circuit, and heard in Richmond, Va., on the 8th day of October 1894. At the February Term, 1895, the opinion of the Court was announced and filed; and thereon it was ordered and

adjudged that the judgment of the Circuit Court be affirmed with costs. The opinion was delivered by Judge Hughes (Record, pp. 38-45), and the judgment thereon by Judge Goff. (Record, p. 45.)

On the 10th of April, 1895, upon the petition of plaintiffs in error, a writ of *Certiorari* of the Supreme Court of the United States was issued, in obedience to which "the cause "and the record and proceedings therein" have been duly certified by the Circuit Court of Appeals for the Fourth Circuit, and are now pending before this honorable Court.

STATEMENT OF THE ISSUES.

1. At the trial the defendants below proposed to prove that the contract of sale of the premises was induced and procured by fraud on the part of the purchaser, J. W. Alexander, in collusion with Edward B. Wesley, now the defendant in error. The jury retired, when William H. Lyles, Esq., who had acted in the matter as the attorney of Alexander and Wesley in the purchase and conveyance of this property, and in all the other transactions connected with this action, testified in substance that upon his delivery of a certified check for the cash portion—one-third of the purchase money—and a bond and mortgage of the premises for the credit portion, amounting to over $10,000, the deed of conveyance from the Sinking Fund Commission to Alexander was delivered to him by the State Treasurer.

After receiving the deed, Mr. Lyles retired from the Treasurer's office, and within two minutes returned, and, calling the Treasurer's attention to the fact that the bond of Alexander contained "a clause authorizing him to anticipate "the time of payment of the bond," informed the Treasurer that, on behalf of Alexander, he desired to pay that bond and mortgage immediately. "We then drew out the Revenue "Bond Scrip, known as Blue Ridge Railroad Scrip, which we "counted out and tendered it in payment."

Mr. Lyles further testified that when he bought the property he "intended to pay for it, and considered the "scrip as good money;" that the purchase was made with a

view to compelling the State to take the deferred payment of it in the Revenue Bond Scrip; that he did not know that this scrip had any value in the market; that the property was purchased for the sole purpose of "creating an issue as "to the validity of the Revenue Bond Scrip," of which Mr. Wesley holds "a large block." (Rec., pp. 13-14; 43.)

In this testimony it was frankly admitted that the sole purpose of the purchase of this property by Edward B. Wesley was to bring about an issue in the Federal Courts to try the validity of the "Revenue Bond Scrip," which had been declared void by the Supreme Court of the State of South Carolina, in the case of the *State ex rel.* vs. *Comptroller General*, 4 S. C., 185. It was held: "That the Revenue "Bond Scrip, issued by the State Treasurer, under Act of "March 2, 1872, 'to relieve the State of all liability for its "guaranty of the bonds of the Blue Ridge Railroad Com- "pany,' being certificates of indebtedness payable to bearer, "issued by the State in its sovereign capacity, with the faith "of the State pledged for their redemption, and intended to "circulate as money, on bills of credit, which, by the Con- "stitution of the United States, a State is inhibited from "issuing, and are therefore void."

Reference may be made to the cases of *Williams* v. *Hagood*, 98 U. S., 72, in which the Supreme Court of the United States dismissed a bill, the object of which was plainly "to obtain a decision touching the constitutionality "of this scrip." Also, the case of *Hagood* v. *Southern*, 117 U. S., 52. In both of these cases Wesley was interested, endeavoring by bill, in the Federal Courts, to enforce the scrip as a valid obligation of the State.

The contract of purchase was thus made with the secret intention of obtaining the possession of this property without paying for it. The defendant below contended that this conduct operated to avoid the contract of sale and the deed made under it, not only as a fraud against the State, but as a fraud upon the jurisdiction of the Courts of the United States. *Lehigh Manufacturing Company* v. *Kelly*, 160 U. S., 327.

Under the ruling of the trial Court the facts were not brought out, and the defendants below were not permitted

to impeach the validity of the deed on the ground of fraud. In this ruling the Circuit Court of Appeals concurred, (Rec., 43), holding that "the payment of the first instalment "of the purchase money, the execution of the deed of con- "veyance to the purchaser and his counter-execution of "bond and mortgage for the deferred installments made the "transaction a perfect and complete one to confer the title "upon the purchaser and to entitle him to possession of the "premises." This, whether the transaction was fraudulent or not, void or voidable. On the other hand, denying the right of defendants below to contest the validity of the deed, the Court assumes that it was a valid deed of conveyance, and adjudges accordingly.

The question of fraud is one of fact, for the jury, under the instructions of the Court; and under the ruling of the Court testimony could not be introduced, however it might tend to establish fraud, the ground being, plainly, that a Court of law could not, in an action of ejectment, entertain any question touching the validity of the deed in question on the ground of fraud in the contract of sale—this being a matter of exclusive equitable jurisdiction. Thus is presented the first proposition of our Brief:

Whether, in an action of ejectment, the defendant below may set up the defense of fraud on the part of the plaintiff below, in the contract of sale of the premises in controversy, so as to avoid the deed under which the plaintiff below claimed title.

2. The answers of the defendants below have already been stated. At the trial Mr. Tindal testified in substance that he was only the custodian of the premises, and has never been in actual possession thereof; his relation to it is the same as to the Governor's Mansion and other like property; he simply has charge of it, with no legal interest or estate in it, to take care of and preserve it in repair. Neither of the defendants below lived on the premises. Boyles was employed to guard and protect the building, as is done at the State House, and the Governor's Mansion when the Governor is not there.

The Railroad Commissioners had their rooms in the building; also, the Weather Bureau; also, Mr. Bowden, an editor, had rooms there, paying rent; and now the State Dispensary has offices and rooms and the liquors in the building (Rec., 16.)

In the statement of the Circuit Court of Appeals is a copy of the Statute of the State prescribing the relation of J. E. Tindal to the property in controversy, as Secretary of State, as follows:

"The Secretary of State shall take charge of the property "of the State the care and custody of which is not otherwise "provided by law. He shall hold the same subject to the "direction and instructions of the Commissioners of the Sink-"ing Fund." * * "There was no provision of law for other "custody of the subject of this suit than that of the Secretary "of State, J. E. Tindal." The immediate custody of the building was in the watchman, J. R. Boyles, appointed by Tindal, whose duty it was to "watch, guard and take care of "the premises. He is one of the defendants" below. (Rec., 39.)

From the statement it also appears (Rec., 40.) that when possession was demanded of the defendant Boyles Mr. Lyles was referred to the Secretary of State, who was not authorized by Statute to deliver possession without instructions from the Commissioners of the Sinking Fund.

It does not appear that demand was made upon the Commissioners, or upon any one having authority, or any of the tenants or occupants having actual possession of the premises or any portion thereof.

At the close of the testimony the defendants below entered a motion to dismiss the complaint on the plea to the jurisdiction of the Court contained in the second defenses set up in the answers of the said defendants and on the evidence introduced to sustain the plea. The defendants contended that they were mere custodians and care-takers of the premises, not in possession or having any interest therein, and were not proper parties to the suit; and that this is in effect a suit against the State of South Carolina. The Court overruled the motion to dismiss the complaint, holding that the defendants below were proper parties to the action; that this cause is not in effect a suit against the State, and that the Court had jurisdiction. (Rec., 31–34.)

The plaintiffs in error contend that their relations to the property are not those of *possession* in the technical sense of the term as intended in the law of ejectment; that of the Secretary of State does not differ from the relation of a real estate agent, whose business is often to take care of, keep in repair and lease the property to tenants; while that that of Boyles is the bald relation of a watchman. Neither of them resided on the premises or was in any sense an occupant thereof. It may be remarked that it was not the duty of the Secretary of State or his watchman to deliver possession of the premises to any one except tenants or occupants. There were in possession of portions of the building at least two tenants paying rent, J. W. Bowden and the "Weather Bureau." No demand was made of either of them, and they are not parties.

The term custodian is not used in the Statute. In all cases where the care and custody is not provided for by law the Secretary is required to "take charge" of the property of the State.

Thus arises the second proposition: *Whether, under this statement of facts, the defendants below were proper parties in such sense as to give to the Court jurisdiction of the person and of the subject of the action?*

3. The second and third propositions, both directed to the jurisdiction of the Court, are presented together in the defendant's bill of exceptions and the assignment of errors. (Record, pp. 30–35.)

In the opinion of the Circuit Court of Appeals, the Court does not state distinctly the difference between these two pleas to the jurisdiction; the one turning upon the relation of the defendants to the property, the other upon the relation of the property of the State. The Court say:

"The third and principal ground assigned as error is a "denial of the jurisdiction of the Court below to try the "cause because of allegations in the pleading that the prem- "ises in dispute were, on the date of plaintiff's demand for "possession, and have been ever since, the property of the "State of South Carolina, in actual public use; that the de-

"fendants below were officers of the State, and in custody of "the premises only as such, and that they had no right, "title, interest or estate of any kind to and in the said "premises." (Rec., 43.)

The judgment demanded in the complaint is "for possession "of the said premises." (Rec., 4.) The "judgment" is that "Edward B. Wesley, plaintiff, do recover of the defendants "J. E. Tindal and J. R. Boyles the possession of the real "property described in the complaint herein." (Rec., 27.) And by the writ of execution, directed to John P. Hunter, Esq., United States Marshal, or his lawful deputies, he is commanded that he "do deliver the property to the said "Edward B. Wesley," &c. (Rec., 29.)

In accordance with the exigency of this writ, issued out of a Federal Court, in a suit to which the State is not a party, the Marshal of the United States is required forcibly to seize and wrest from the direct and immediate possession of the State of South Carolina the real property in controversy, and, without regard to the right of the State therein, to deliver the same to the claimant, Edward B. Wesley.

Under this statement plaintiffs in error submit their third proposition, in the language of the precedents:

WHETHER THIS ACTION IS IN EFFECT A SUIT AGAINST THE STATE?

ARGUMENT.

FIRST PROPOSITION.

In the decision of the Circuit Court of Appeals this proposition is stated in these words:

"The suit which he (the plaintiff below) brought for the "possession, involved no other inquiry than whether his first "payment had been made, whether a valid deed of convey- "ance had been executed, and whether he had further com- "plied with the terms of sale relating to the bond and mort- "gage for the future installments. What might have been "his secret intentions with respect to the deferred payments, "was a question foreign to his suit for possession of the "premises to which he had become entitled, and all evidence "in regard to such intentions was properly ruled out."

The validity of the deed and the good faith of the alleged compliance with the terms of sale put in issue by the defense were thus assumed, these questions at the same time being held foreign to the issue.

In the argument for the defendant in error on this point reliance is placed solely upon *Field* v. *Seabury*, 19th How., 323–333, and *White* v. *Bumley*, 20 How., 235, to the point that "as "to a grant or patent for land, a third party cannot raise in "ejectment the question of fraud as between the grantor and "grantee, and thus look beyond the patent or grant."

The deed under which claim of title is set up by the defendant in error is not a grant or patent in the sense intended by those cases. The State acquired title to the premises in question by deed from private parties; and the deed was made by the Commissioners of the Sinking Fund as such, not in the name of the State, nor under the great seal, upon sale at auction, in pursuance of Statute approved 24th December, 1890.—20 Stat. at Large, 707.

We submit that in the trial Court defendants below were entitled to impeach the contract of sale and the deed for fraud, under the familiar rule that in order to recovery in an

action of ejectment plaintiff must show a perfect title paramount, while defendant may introduce under the general issue evidence of any facts tending to avoid the deed under which plaintiff claims title.

1 Chitty Pl., No. 507; 2 Estee Pl., Sec. 3759; Bliss, Code Pl., Sec. 328; Pom. Rem., Secs. 670–679; 2 Pom. Eq. Jur., Sec. 872; *Gregg* v. *Sayre*, 8 Pet., 244; *Swaze* v. *Burke*, 12 Pet., 11; *McCall* v. *Carpenter*, 18 How., 297; *Blanchard* v. *Brown*, 3 Wall., 245; *Lombard* v. *Cowhan*, 34 Wis., 487; *Brown* v. *Freed*, 43 Ind., 253.

In the case of *White* v. *Burnley, supra*, while sustaining the rule peculiar to "letters patent," is stated the general proposition that "a Court of law has concurrent jurisdiction "with a Court of equity in matters of fraud;" "but the "defects in the entry and survey cannot be taken advantage "of at law. The patent appropriates the land, and gives the legal title to the patentee.

Swaze vs. *Burke*, 12 Pet., 11: "It is held in all jurisdic- "tions that a Court of law has concurrent jurisdiction with "the Court of Chancery in cases of fraud."

McCall v. *Carpenter*, 18 How, 297: "In an action of eject- "ment by the heirs, evidence was admissible to show that "the deed of their ancestor had been obtained by fraud."

In *Blanchard* v. *Brown*, 3 Wall., 245, in ejectment, the question of fraud in obtaining a title to real estate had been submitted and determined against the party setting it up. It was held that such party could not "go into equity and ask "relief there, setting up substantially the same frauds and "sustaining them by the same evidence that he relied on to "make out his case in the suit in ejectment at law." The Court, Mr. Justice Davis, says, pp. 249–250:

"Blanchard did not resist Brown's recovery in the action "of ejectment on the sole question of paramount legal title, "which he had the right to do, and then endeavor to get rid "of it in chancery on the question of superior equities. He "chose rather to risk his whole defense in the impeachment "of Brown's title for fraud, and because the sale was vitiated "by irregularities and the property sacrificed. Having failed "before the jury, he is estopped from investigating the same "matters in another jurisdiction. He waived his right to

"have the question of fraud litigated in a Court of chancery, "when he presented it as a defense to the action at law, and "the defense was legitimate and proper, for such questions "of fraud and irregularity as were raised could be disposed "of as well at law as in chancery."

Lombard v. *Cowhan*, 34 Wis., 487: "If the deed to B. "(plaintiff) were void by reason of fraud, that would be a "legal defense to an action of ejectment: and the question "of fraud would be one for the jury under a general denial "in the answer."

2 Pom. Eq. Jur., Sec. 872: "Fraud, in some of its phases, "has long been an occasion for the exercise of jurisdiction "both at law and in equity. The various reliefs on the "ground of fraud which are possible from the nature of the "legal and equitable mode of procedure are the following:

"At law. * * * 3. Defensive relief, whereby the "party sets up fraud as a defense, and thereby defeats any "action brought to enforce the apparent obligation."

In South Carolina, the same rule is established; *Martin* v. *Raulett*, 5 Rich. L., 541: "In an action of trespass to try "title" (which was at one time substituted for the ancient action of ejectment) "a subsequent purchaser at Sheriff's "sale may show that a prior Sheriff's sale of the same land, "as the property of the same defendant in execution, was "fraudulent and void, although there had been no proceed- "ing in equity setting aside such prior sale."

See, also, *Keenan* v. *Pearson*, *Ib.*, 549, where a bill had been filed in equity to set aside the sale on account of fraud, which had been dismissed for want of prosecution. The reasoning of the Court is specially applicable to the case in hand.

Smith v. *Cuthbertson*, 9 Rich. L., 106, was a case of trespass to try title. The deed set up by the plaintiff was successfully impeached for fraud. The conveyance was "held "void: the jury having found that it was made with intent "to defeat a cause of action in a suit pending."

Maddox v. *Williamson*, 1 Strob., 23. In an action at law, an assignment came into question. The Court held

that in such case it "will, if fraudulent, be regarded as a "nullity." Exception was taken on the ground that "the "Court of law had no jurisdiction to try the validity of the "assignment in question." The Court says: "An assign- "ment, no more than a deed, can in a Court of law be set "aside and cancelled—but when either deed or assignment "come into question in an issue here, it will, if fraudulent, be, "for the purpose of that issue, regarded as a nullity."

"Even in the absence of fraudulent misrepresentations or "false pretenses, the doctrine established by a preponder- "ance of authority in the Courts of this country is that a "purchase of goods by one who intends at the time not to "pay for them, is such a fraud as will entitle the vendor to "avoid the sale."—8 Am. and Eng. Ency. Law, p. 825; *Biggs* v. *Barry*, 2 Curtis, 262; *Davis* v. *Stewart*, 8 Fed. Rep., 803; *Wright* v. *Brown*, 67 N. Y., page 1.

This principle is as well applicable to contracts for the sale of real estate as to contracts representing the sales of personal propeaty.—*Bank* v. *Gregg*, 14 N. H., 331.

The occasion does not call for extended argument whether the transaction between the Commissioners of the Sinking Fund and Wesley was in law fraudulent in such sense as to avoid the deed. We think it clear. The question, however, is whether the Circuit Court erred in rejecting testimony to this point as *incompetent and irrelevant*.

The question was for the jury, under the instruction of the Court, and could not properly have been taken from the jury, upon the ground that in law the deed could not be avoided under the facts presented. The ruling of the Court is referable only to the ground that in an action of ejectment the validity of the deed cannot be impeached for fraud—this being a matter of exclusively equitable jurisdiction.

In the decision of the Circuit Court of Appeals it is said (Record, 44): "A case rarely arises in the Courts more

"fully within the terms of a ruling decision than is the case "at bar within the meaning and tenor of the language of "the Supreme Court in the case of *Stanley* v. *Schwalby*, con- "fining and explaining the decision in *Kaughman* v. *Lee*."

In those cases the validity of the title was subjected to patient and searching enquiry, and the very right of the matter was determined. In the case at bar, this is assumed in one breath and then held to be foreign to the suit. Here is a particular in which the cases do not appear to be "on all fours."

In the statement of the Circuit Court of Appeals (Record, 39,) it is said: "This suit is by complaint, and is in South "Carolina a statutory action equivalent to and a substitu- "tion of the common law action of ejectment." To this it may be added that the action remains subject to the rules and principles of law relating to the ancient action of ejectment: *Geiger* v. *Kaigler*, 15 S. C., 262; *Verdier* v. *R. R. Co.*, 15 S. C., 476, 478; *Lyons* v. *Holmes*, 19 S. C., 406, 412.

The plaintiffs in error submit that, should their further exceptions be overruled, the cause should be remanded to the trial Court, that defendants below may have full opportunity to introduce evidence upon this issue, and have therefrom a verdict of the jury.

SECOND PROPOSITION.

In the decision of the Circuit Court of Appeals this proposition is not passed upon. It is merely stated that "the de- "fendants below were officers of the State and in custody of "the premises only as such, and that they have no right "title, interest or estate of any kind to or in the premises." (Record, 43.) To this it is necessary to add that the defendants below expressly disclaimed possession of the premises in the legal sense of the term; and on the contrary averred that the possession and ownership were and is directly in the State.

In the action of ejectment, the rule is of universal application that the defendant must be in actual possession, whether as claiming adverse title, or as an occupant or tenant under a claimant or landlord.

As to the possession, the terms occupancy and tenancy mean the same thing; in either case *actual* possession being necessary. (Rap. and L., pp. 892-3; Bouvier, Dic., 258.) A tenant is one who holds or possesses lands or tenements by any kind of title, in fee, for life, for years, or at will. (Bouvier, 573).

The defendants below, at the commencement of this action, were neither occupants nor tenants. *The Court was therefore without jurisdiction of any party in interest or of the subject matter of the action.*

In the cases of *Kaughman* v. *Lee*, and *Stanley* v. *Schoralby*, judgment was entered. But in each, the defendants below admitted possession; and in neither case was the question mooted. So, as to this essential point, these cases are not "on all fours" with the case at bar.

So far as our research goes, the authorities sustain our proposition by an unbroken current. 6 Am. and Eng. Enc., pp. 245*c*, 245*m*; Tyler on Ejectment, 411; 7 Lawson on Rights, Remedies and Practice, Sec. 3708; 1 Estee, Pl., Secs. 165, 243; Sedg. and Wait on Trial of Title to Land, Secs. 242-3; *Davis* v. *Clancey*, 3 McC., 422; *Anderson* v. *Lynch*, 37 S. C., 575; *Garnett* v. *Garnett*, 7 Mon. (Ky.), 545; *Pope* v. *Prendergast*, 1 Marshall, 122; *Redfield* v. *Utica*, 5 Barb., 54; *Dunton* v. *Warschauer*, 21 Cal., 609; *Hawkins* v. *Reichert*, 28 Cal., 534; *Taylor* v. *Crane*, 15 How. Pr., 358; *Grundy* v. *Hatfield*, 18 Atlantic Reporter, 186 (R. I.); *Shaver* v. *McGraw*, 558; *Chiniquy* v. *Bishop*, 41 Ill., 148; *People* v. *Albrecht*, 11 Abb. Per., 97.

Under the title "Ejectment," in 6 Am. and Eng. Ency., 245*c*, it is said: "The rule at present in regard to parties defendant requires the plaintiff in the action of ejectment to make all those parties who have or claim an interest, ownership, title or right of possession, in or to the demanded premises to be made parties, to bind them upon the question of title, and as against such persons as are not made parties and who ought properly to have been joined no title is established by the judgment. * * * *

"As a rule, the action should be brought against the party in actual possession of the premises claimed, or in case there is no one in actual occupancy, or there is a tenant in possession, it may be brought against such tenant or the one exercising acts of ownership or claiming title in the premises."

Again, same volume, 245*m*: "It must be proved as against the defendant named in the action in ejectment that he was actually in possession when the suit was commenced, unless he be one admitted to defend in the place of another."

The rule is thus stated in Tyler on Ejectment, 411: "Except in some cases provided by statute, the defendant in ejectment must be the tenant in possession of the premises in dispute, and ejectment will not lie against a person who is, to all intents and purposes, out of possession. It must therefore appear that the person or persons on whom the declaration and notice were served was or were tenants in possession at the time the service was made."

The same high authority, on page 623, repeats the rule thus: "If there be an actual occupant, he must be named as defendant in ejectment. If the premises are actually occupied, it is immaterial who claims to be the owner."

7 Lawson on Rights, Remedies and Practice, Sec. 3708: "it must be shown that the defendant is in actual possession of the property in question."

In *South Carolina* it was at one time held that the action would lie against a trespasser not in possession at the time of the action. This was overruled in *Anderson* v. *Lynch*, 37 S. C., 575, where the Court says: "But it is urged that it is error to hold that the action could not be maintained unless the defendant, in person or through another, was in possession at the time the action was brought. It is true that the case of *Binda* v. *Benbow*, as at first reported in 9 Rich., 15, did hold that it is sufficient to prove a trespass within ten years before the commencement of the action. We think this judgment was hastily rendered, and, considering that it is not sustained either by principle or the current of authorities, we feel constrained to overrule it, which is done."

Garnett v. *Garnett*, 7 Mon. (Ky.), 545, a case under the old form of action: "No principle is better settled than that to enable a plaintiff in ejectment to recover, he must prove the defendant to be possessed, unless the defendant is made so for the purpose of defending the possession of some other. If, therefore, the lessor's title had been made out in proof, the plaintiff would not, on account of lack of evidence of possession in the appellants, have been entitled to a verdict against the appellants."

Again, in *Pope* v. *Prendergast*, 1 Marshall, 122: "A plaintiff in ejectment cannot succeed unless he shows the defendants to be in possession."

Redfield v. *Utica R. R. Co.*, 5 Barb., 54: After a learned discussion of the history of the action for the recovery of lands, from the ancient real action to the action under the Codes of Civil Procedure, the Court say: "Under all the changes of practice and the purposes to which the action is applied, it has only been permitted to be brought against some person in possession exercising acts of ownership and claiming title."

Hawkins v. *Reichert*, 28 Cal., 534, 537: This was an action in ejectment. Verdict for the defendant. The Court say: "The doctrine is very clear, that as the action lies only to recover the possession of the premises wrongfully withheld from the plaintiff, it must be brought against the person who, at the commencement of the action, withholds the possession—that is to say, it must be brought against the occupant." Cases cited: *Garner* v. *Marshall*, 9 Cal., 270; *Burke* v. *Water Co.*, 12 Cal., 403; *Dutton* v. *Warschauer*, 21 Cal., 609; *Fogarty* v. *Sparks*, 22 Cal., 148; *Owen* v. *Fowler*, 24 Cal., 192; *Lyle* v. *Rollins*, 25 Cal., 440.

In *Klinck* v. *Cohen*, 13 Cal., 623: "In ejectment the suit must be brought against the terre-tenant or party in possession." Cites "Adams on Ejectment," 572.

Taylor v. *Crane*, 15 How. Pr., 358: "If the premises are actually occupied, the occupant must be made a defendant. This was the old rule, and the case of *Doe* v. *Stanton* (2 B. & Al., 371) turned upon the point whether the defendant was in the situation of servant to another or in the possession as servant."

Grundy v. *Hatfield*, 18 Atlantic Reporter, 186 (R. I.): "The action must be brought against the actual occupant or tenant in possession."

Thus far the authorities are rather to the point that the owner, tenant or occupant *in actual possession* is a *necessary* party defendant. This answers to the reason of the thing. The plaintiffs in error have no interest or estate in the premises; on the contrary, they have no higher relation to the property than the mere day laborer in his master's garden; and neither has nor claimed the power of surrendering possession of the premises. Recurring to the analogy in our statement, we insist that it would be equally as logical to bring an action in ejectment against a real estate agent employed by the owner to take charge of, keep in repair and lease to tenants his real property. As against these defendants, holding such relations, it is impossible that the action in ejectment can be effectual either as to the person or as to the subject matter of the action.

In support of the affirmative proposition that the plaintiffs in error are not proper parties to the action, authority is equally direct, full and conclusive; and it may be maintained even though the defendants were actual occupants, if their occupancy be held as the agents or employees of another. We quote:

In South Carolina the rule is laid down in *Davis* v. *Clancey*, 3 Mc,422: "There is as pecies of tenancy in this country "which is very unusual, if not altogether unknown, in Eng- "land. It is not unusual for persons owning tracts of unoccu- "pied lands to place agents on the premises for the purpose of "holding possession for them and to protect the lands from "depredation. Such a tenancy is not considered as convey- "ing any right to the tenant. Such a possession is consider- "ed the possession of the landlord and not of the tenant, not- "withstanding he may be allowed the privilege of cultivating "a part of the land for his own use."

1 Estee, Pl., 165: "The general rule is that ejectment can be maintained only against the real party in possession, although he is not personally on the premises, but may be in possession through servants and employees. *A mere party in charge for others is not an occupant* (italics ours).

Sedg. and Wait on Trial of Title to Land, Sec. 242: "A servant or employee claiming no title or interest to himself or any right to the possession is not usually liable to an ejectment. Such an employee is not an occupant within the meaning of the rules of law governing ejectment. *He is acting under the control of another, and it is only in another right that he occupies the premises.*"

Ibid, Sec. 243: "On this principle it has been held in the Supreme Court of Illinois that a clergyman who preached in a church edifice under the direction and employment of a religious corporation was not liable to an action of ejectment. As well, say the Court, might the claimant of a farm bring his action against the men employed to cultivate the farm. Even in England a parson claiming the right to enter and perform divine service, has been held not to have a sufficient title to be admitted as a defendant. It has been decided in New York that where the property in controversy was a church edifice occupied and used by a society for the purpose of religious worship, it was to be deemed to be in the possession of the corporation, and ejectment would not lie against the trustees or other officers of the church."

Shaver v. *McGraw*, 12 Wend., 558, syllabus: "Where a party *not in the actual occupation* of premises as distinguished from the exercise of acts of ownership, is found in the cultivation of and working upon the premises and an action of ejectment be brought against him, it is competent to him to show that he labors upon the premises, as a mere servant of another; and if the jury find his allegation to be true, and that he is not the tenant of the premises, he is entitled to a verdict in his favor."

In *Dunton* v. *Warschauer*, 21 Cal., 609, it may be readily seen that a mere servant or employee may, in one sense, have the occupation of the premises of which he has control and in which he claims no right; but his occupation is the occupation of his employer within the meaning of that

term as employed when treating of the action of ejectment. Conceding that Klatt was personally present and living in the house, it was still a question of fact for the Court to determine whether he was there in his own behalf or only or solely as the employee of the defendant." See *Polack* v. *Mansfield*, 44 Cal., 36, 39, to the same effect.

Chiniquy v. *Bishop of Chicago*, 41 Ill., 148: "Persons who are in the possession of land merely as servants or employees of the party claiming title adversely are not occupants of the land within the meaning of the ejectment law, and an action cannot be maintained against them."

People v. *Albrecht*, 11 Abb. Pr., 97: "A person may occupy land, as he may do any other act, either in person or by an agent or servant, and in the latter case the possession and occupation of the agent or servant will be that of the principal, and it cannot be in both at the same time."

This case is not in conflict with that of *U. S.* v. *Lee*, U. S., 172. There the property was in the occupancy of the officers of the United States Army, commanding and resident on the premises. *Ambrecht's* case, an able discussion of the proposition for which we contend, is to the point that the action could not be brought against a common soldier in charge under superior officers. On the same principle the action cannot be maintained against Boyles or against Tindal, acting under superior officers, the Commissioners of the Sinking Fund.

The plaintiffs in error submit that if this proposition be sustained, the Court is without jurisdiction of the parties, and without jurisdiction as to the subject matter of the action.

THIRD PROPOSITION.

Whether this action is in effect a suit against the State? Bill of Exceptions, (Rec., 312). Third assignment of errors, (Rec., 34).

["Reference is here requested to the statement of the Circuit Court of Appeals, in the last paragraph of page 39 of

the Record, as follows: "The State of South Carolina is not a party to the suit in any form; she did not come into Court to make suggestions of her title to the premises under dispute, and for that purpose only, as was done in *Kaughman* v. *Lee*. She left her relations to the property to be gathered exclusively from the pleadings and the evidence."

In the statement of proceedings in the Circuit Court of Appeals, pp. 37–38, this entry appears: "October 3, "1894.—Motion of plaintiffs in error to certify questions of "law to the Supreme Court of the United States, and Ex- "hibit Transcript of Record, Supreme Court of the United "States, October Term, 1894, No. 796: The State of South "Carolina, plaintiff in error, against Edward B. Wesley, "filed September 10, 1894, filed."

On the files of the Supreme Court will be found the Transcript of Record, "*The State of South Carolina, plaintiff in error*, v. *Edward B. Wesley*, filed September 10, 1894"; from which it will appear that the State, by the Attorney General, did go into the trial Court and make suggestion of her title to the premises in dispute, and for that purpose only, as was done in *Kaughman* v. *Lee*. At the hearing in the Circuit Court of Appeals, by leave of the Court, a certified copy of this Transcript was exhibited to the Court and there filed. This appears on page 38 of Record, C. C. A.]

In the decision of the Circuit Court of Appeals (Record, 43-44) it is said:

"It is equally well settled that suits may be brought, un- "der special circumstances, for property claimed by a State "and in the individual possession of individual persons hold- "ing for and in the name of the sovereign. There is some "confusion in the decisions on this question when they come "to define what the special circumstances and conditions "are under which the property of a sovereign in possession "of agents or officers may be the subject of suits against "such persons.

"In the present case we are saved the task of entering "upon a general survey of the decisions on this vexed ques- "tion that have been rendered in the Courts of this and the

"mother country. The case at bar is, practically and in "principle, all fours with that of *U. S.* v. *Lee*, or *Kaughman* "v. *Lee*, 106 U. S., 196, and is ruled by the decision in that "case and in *Stanley* v. *Lee*, 147 U. S., 508."

After quoting from *Stanley* v. *Schwalby*, at page 518, the decision continues: "A case rarely arises in the Courts more "fully within the terms of a ruling decision than is the case "at bar within the meaning and tenor of the language of "the Supreme Court in the case of *Stanley* v. *Schwalby*, "confirming and explaining the decision in *Kaufman* v. "*Lee*."

We submit that these cases are alike in no particular save in the fact that each is an action in ejectment; and that the case at bar is one, in some aspects, of novel impression. Of the three propositions here presented, not one is to be found in *Kaughman* v. *Lee* or in *Stanley* v. *Schwalby*. In no particular is the difference more marked than in the fact that, while in the previous cases cited the doctrine involved is derived from the common law of England, in the case at bar the issue is controlled by an imperative mandate of the Constitution of the United States in the words of the eleventh amendment:

"The judicial power of the United States shall not be con- "strued to extend to any suit in law or equity commenced "or prosecuted against one of the United States by citizens "of another State or by citizens or subjects of any foreign "State."

The plaintiffs in error do not seek immunity from this action by interposing a mere rule of the common law, either of England or of the United States. On the contrary, they are claiming the protection of the Constitution of the United States, to which this Court will yield unquestioning obedience unless it be clearly shown to be inapplicable. In this presence, nothing need be said in argument to the point that the Constitution of the United States will be enforced by this Court without consideration of the right or wrong of it.

It may be questioned whether this old doctrine of the English common law answers to right reason, and by the same sign we might cast ridicule upon this provision of the Constitution, if we dare. We see the force of the assertion

that in England, where the petition of right may go to the Crown, the doctrine has gone into disuse, and that here, where the individual citizen is king, it ought not to prevail. Mr. Justice Davis, in *U. S.* v. *Lee*, says:

"As no person in this Government exercises supreme executive power or performs the public duty of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our Courts as a part of the general doctrine of publicists that the supreme power in every State, wherever it may reside, shall not be compelled by process of Courts of its own creation to defend itself from assaults in those Courts.

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he in one of the Courts of competent jurisdiction has established his right to property there is no reason why deference to any person, natural or artificial—not even the United States—should prevent him from using the means which the law gives him for the protection and enforcement of that right."

With such prepossession of opinion, it is not surprising that the Supreme Court should hesitate to interpose this doctrine to sustain the United States in a grievous wrong and forcible injury to the right of the citizen in the property at Arlington. But can it be said that the Court would have held the same opinion if it had been confronted by a solemn and imperative mandate of the Constitution of the United States? Can this mandate be put aside simply because it does not agree with our conceptions of what is right or expedient? We are not taking refuge behind an unconstitutional statute of a State. We are not in violation of any law of the United States which can operate to avoid the application of the protection we invoke. We are simply holding up the impenetrable shield of the supreme law of the nation.

In another aspect, is the case at law different from *U. S.* v. *Lee*. In that case, the estate had been forcibly taken

from the possession of the owner under circumstances of peculiar hardship and outrage; while in the case at bar the premises in question were and are in the quiet and peaceable possession and ownership of the State, and are held to circumvent the consummation of a fraud against the State in the contract of sale to the defendant in error. Technically an action in tort; it is essentially an action to enforce specific performance of the contract of sale between the defendant in error and the State.

Other material points of difference will appear in the progress of the argument. Enough has been said to render the case out of precedent with those cited by the Court below. These points of difference, we submit, are such as, in accordance with the later decisions, to bring the case at bar directly within the immunity from suit provided by the eleventh amendment.

In discussing this provision of the Constitution, this Court will give it a liberal construction. *In re Ayers*, 123 U. S., 443, 505: "To secure the manifest purpose of the Constitu-"tional exemption guaranteed by the eleventh amendment, "requires that it shall be interpreted, not literally and too "narrowly, but fairly and with such breadth and largeness "as effectually to accomplish the substance of its purpose."

In the earlier cases, the rule of a more severe and literal construction seemed to prevail. But from *Louisiana* v. *Jumel*, 107 U. S., 711 (1882), is a series of cases, extending and enlarging the application of this Constitutional limitation. Upon these we rest the argument of our case. We cite *Louisiana* v. *Jumel, supra*; *Cunningham* v. *Macon and Brunswick Railroad Company*, 109 U. S., 440; *Hagood* v. *Southern*, 117 U. S., 52; *In re Ayers*, 123 U. S., 443; *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S., 362.

First. We repeat that this is, in purpose and in effect, a suit to enforce a contract between the defendant's grantor and the Commissioners of the Sinking Fund as agents of the State, for the purchase and delivery of possession of the premises in controversy, then and now held as the property of

the State. For reasons not here pertinent, the contract was not consummated by an actual delivery of possession, and the property remains in the possession of the State.

The so-called custody of the Secretary of State was held under the exclusive control and direction of the Commissioners of the Sinking Fund, with whom, as agents of the State, the contract was made. The plaintiff, Tindal, was not a party to the contract, and in relation to it had no duty to perform; certainly, it was not his duty to give possession to a purchaser, without instructions from this Board.

Instead of making demand upon this Board, rather than upon the care-taker, and thereupon taking proceedings to enforce the performance of this contract, either at law or in equity, plaintiff below elected to bring ejectment—resorting to all the ancient fictions to support a tort, when in truth the real controversy arose out of matter of contract alone, without any of the incidents of trespass and violence, wrong and injury which characterize actions in tort. This Court in such case will disregard the form of the action, and look to the real origin, character and purpose of the controversy.

This was done in the case of *Hagood* v. *Southern*, 117 U. S., 52, to which the plaintiff here was a party. The suit was brought to enforce the obligation of the contract between the defendants in error and the State, evidenced by this same "Revenue Bond Scrip." We quote from the opinion of the Court, page 67:

"The controversy in which the validity and obligation of the scrip are involved is the subject of the present suits. The complainants as holders of this scrip, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and, except with that consent, it

could not be brought before the Court and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed, the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit, and the suit is, therefore, substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States."

To the same point is the case, *In re Ayers*, 123 U. S., 443, an elaborate and most exhaustive discussion of this subject. The relief prayed in these bills is sought through the coercion of the fiscal officers of the State, while in the case at bar the relief demanded is for a judgment for the possession of the property, and a writ of execution placing the hand of the Court upon the property itself. This judgment would be obnoxious to criticism for this stronger reason.

After stating the distinction between "contracts of a State "with individuals and contracts between individual parties," Mr. Justice Mathews, delivering the opinion of the Court, page 505, says: "It is different with contracts between individuals and a State. In respect to these, by virtue of the Eleventh Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion." We refer as well to pages 500 to 505.

SECOND. *In the case at bar, the State is an indispensable party.*

It is brought against the defendants as individuals: but in the record it clearly appears that they are sued by reason of their relation and conduct as officers and agents of the State. In this aspect of the case, whether they were in actual possession of the premises or not becomes a matter of

indifference. Their possession as agents is the possession of the State. They have no interest in the property; and the remedy is sought directly against the land, of which the State claims to be in the actual possession as the sole and exclusive owner. To such an action, the State is not only a necessary but is the only proper party defendant.

In *Pennoyer's* case, it is said: "The Court will look be-"hind and through the nominal parties on the record, to "ascertain who are the real parties to the suit."

In *Cunningham* v. *Macon*, Mr. Justice Miller, after stating the general principle that a State cannot be sued without its consent, says: "This principle is conceded in all cases, "and whenever it can be seen that the State is an indispens-"able party to enable the Court to grant the relief sought, "it will refuse to take jurisdiction."

In the *Ayers* case, it is held that it is not conclusive "of "the principal question in this case that the State of Vir-"ginia is not named as a party defendant. Whether it is "the actual party, in the sense of the prohibition of the Con-"stitution, must be determined by a consideration of the "nature of the case as presented in the whole record."

Again, in the *Ayers* case, p. 505, it is said: "To secure the "manifest purpose of the Constitutional exemption guaran-"teed by the Eleventh Amendment, it should be interpreted "not literally and too narrowly, but with the breadth and "largeness necessary to enable it to accomplish its purpose; "and *must be held to cover, not only suits brought against a* "*State by name, but those against its officers and representa-*"*tives, where the State, though not named, is the real party* "*against which the relief is asked and the judgment will* "*operate.*" (Italics ours.)

We recur to the opinion in the *Hagood* case as directly applicable to the case at bar, and repeat briefly the doctrine there held: "Though not nominally a party to the record, "the State is the real and only party in interest, the nomi-"nal defendants being the officers and agents of the State, "having no personal interest in the subject matter of the "suit, and defending only as representing the State. * * * "The State is not only the real party to the controversy, "but the real party against which relief is sought by the

"suit, and the suit is, therefore, substantially within the pro-"hibition of the Eleventh Amendment to the Constitution "of the United States."

From *Pennoyer* v. *McConnaughy*, 140 U. S., 1, we quote on page 9: "It is well settled that no action can be main-"tained in any Federal Court by the citizens of one of the "States against a State, without its consent, even though the "sole object of such suit be to bring the State within the "operation of the Constitutional provision which provides "that 'no State shall pass any law impairing the obligation "of contracts.' This immunity of a State from suit is ab-"solute and unqualified, and the Constitutional provision "securing it is not to be so construed as to place the State "within the reach of the process of the Court."

THIRD. But for the fact that this is an action of ejectment, in which respect alone is it "on all fours" with *U. S.* v. *Lee*, the argument might here end. In the cases already cited in favor of our proposition, remedies were sought to obtain relief by coercing the agents of the State by mandatory judgments. Here the relief is sought by a judgment aimed directly and immediately against real property claimed to be in the ownership and in the actual possession of the State —"the real and only party in interest; * * * not only "the only real party to the controversy, but the real party "against which relief is sought by the suit" (*Hagood's* case); or, in the language of *Ayer's* case, "the only real party "against which alone in fact the relief is asked, and against "which the judgment or decree effectively operates." The case at bar is in this respect one of novel impression. But the case of *Cunningham* v. *Macon* and *Brunswick Railroad Company*, in which the relief is sought by proceedings in foreclosure, is, in principle, "on all fours."

This case was by bill to foreclose a second mortgage against the Macon and Brunswick Railroad Company, the first mortgage having been previously foreclosed by a sale of the property of the company to the State, at the time of the suit holding it in possession by its agent. The remedy sought was to "set aside the sale to the State, to

be let in as prior in lien, and for other relief directly affecting the property." The bill impeached the validity of the sale. It was dismissed by the Circuit Court upon demurrer, in the decision of which the validity of the sale and of the title was assumed, the opinion going upon the hypothesis that the title of the State was valid.

In the case at bar the facts as to the question of title are almost identical. We have to repeat that the deed under which plaintiff claimed was assailed by the defendant. True, this case went upon verdict, but under direction of the Court, assuming, in the absence of the facts, that the deed is valid. So that this Court is not informed by the verdict where the right of the controversy rests; whether the deed is valid or void.

The opinion of the Court in *Cunningham's* case is a clear, concise exposition of the law on this topic, rendered by the Justice who delivered the opinion in *U. S. v. Lee*, in terms which, we respectfully submit, cannot be reconciled with the authorities upon which that decision was based.

The Court say, 109 U. S., 457:

"In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued had any personal interest in the matter or any official authority to grant the relief asked.

"*The State is in the actual possession of the property and the Court can deliver no possession to the purchaser. The entire interest adverse to the plaintiff in this suit is the interest of the State of Georgia in the property of which she has both the title and possession.*" (Italics ours.)

The point we desire to emphasize is that the State is in possession of this property, and this Court can deliver no possession to the purchaser. The exigency of the writ of possession requires that this Court shall lay its hands upon the property, wrest it from the possession of the State, and deliver it to Edward B. Wesley, upon process more violent and more directly in conflict with the Constitution than in either the *Cunningham* or the *Jumel* case.

We submit that no case can occur so clearly establishing our proposition that the case at bar is *in effect a suit against the State*. It can be characterized by no happier phrase.

The right or wrong of it is not the question. The principles of abstract justice have nothing to do with it. There is no discretion to be exercised, as in *Lee's* case, where the doctrine involved was at the common law. The question is only whether, right or wrong, justly or unjustly, the jurisdiction of the Federal Court is prohibited by the Constitution of the United States, which, whatever it may be, is, of its own proper force, always right.

We crave leave to cite an opinion contemporaneous with the adoption of the Constitution, delivered by a masterful lawyer and statesman who was at the making of it. The Federalists of that day obtained the assent of the States to the Constitution as adopted by persuading them, among other things, that they were surrendering no portion of their sovereign immunity from suit. We quote from the Federalist, No. LXXXI:

"The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Samuel W. Melton

Wm A. Barber

Henry N. Obear.

Office Supreme Court, U. S.
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CLERK.

15,803.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 231.

J. E. TINDAL AND J. R. BOYLES, *Plaintiffs in Error,*

versus

EDWARD B. WESLEY, *Defendant in Error.*

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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STATEMENT.

This action was brought in the Circuit Court of the United States for the District of South Carolina by Edward B. Wesley, a citizen of the State of New York, against J. E. Tindal and J. R. Boyles, citizens of the State of South Carolina, for the recovery of the possession of a certain lot of land, situate in the City of Columbia and State of South Carolina, of the value of $16,165, known as the "Agricultural Hall," and damages for its detention.

The complaint, after an allegation of the citizenship of the parties, alleged that plaintiff had, on the 16th day of February, 1892, purchased the premises from the Commissioners of the Sinking Fund of the State of South Carolina, and had taken a conveyance therefor. That the plaintiff, being in possession of said premises, the defendants, on the 27th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff, and that "the defendants are, and ever since the 20th day of February, 1892, have been, in possession of said premises, and have been and still are withholding the same from the plaintiff, although the plaintiff has demanded from the defendants the possession thereof, to the damage of the plaintiff $10,000."

The answer comprised two defenses, separately pleaded under the Code of South Carolina. The first consisted of a general denial; the second contained no denial of the allegations of the complaint, but consisted simply of allegations to the effect that the lot in question was the property of the State of South Carolina and in actual public use, and that the defendants were holding the same in their official capacity.

Upon the trial of the cause the plaintiff proved that the State of South Carolina had been the owner of the property, and that it had been sold at public auction, after due advertisement, by the Commissioners of the Sinking Fund, on the first day of February, 1892, pursuant to an Act of the General Assembly of that State, and was purchased by one J. W. Alexander, a citizen of the State of North Carolina, at the price of $16,165, and that Alexander had complied with the terms of the sale by paying to the State Treasurer one-third of the purchase money in cash, and executing to him his bond and mortgage of the premises for the balance of the purchase money, and had received a deed for the premises in due form, executed by

the Commissioners of the Sinking Fund and delivered by the State Treasurer, and had been put into possession of the property by the Commissioners. The case resulted in a verdict and judgment for the plaintiff below.

Although the assignment of errors in the Circuit Court covered three grounds, the second, based upon the refusal of a motion for a non-suit, was abandoned by agreement of counsel, and the evidence bearing upon the point was, by agreement, left out of the printed record. (See agreement at bottom of page 1 of printed record).

The other two questions were, (1) as to the exclusion of certain testimony, and (2) as to the refusal of defendants' motion to dismiss the complaint, based upon the second defense pleaded in defendants' answer. These questions arose thus, to wit: (1) the witness, Wm. H. Lyles, having testified to the payment of the purchase money and delivery of the bond and mortgage, and the receipt of the deed from the State Treasurer, was under cross-examination, and defendants sought to interrogate him as to a transaction occurring between him and Mr. Muller as the attorneys of J. W. Alexander on the one part, and the State Treasurer on the other part, a few minutes after the completion of the delivery of the deed above referred to, and after they had left the State Treasurer's office and returned. The evidence was objected to, and was ruled out by the Circuit Judge. The evidence ruled out was as follows, to wit:

"Q. You and Mr. Muller went out of the State Treasurer's office and almost immediately returned. Now what occurred between the State Treasurer on the one hand and Mr Muller and yourself on the other? A. We returned within five minutes—I think within two minutes. We called the State Treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the Revenue Bond Scrip, known as the Blue Ridge Railroad Scrip, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from

its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing.

"Q. And it was refused? A. Yes; the advertisement was not referred to.

"Q. Was it not the purpose of the transaction to create an issue in the United States Circuit Court in order to test the validity of the Revenue Bond Scrip, and was not that the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the Revenue Bond Scrip, but as to the United States Circuit Court we were not.

"Q. Then, when you bought it, you did not intend to pay for it in good money? A. We did, and considered scrip as good money.

"Q. When you made the purchase you made it with a view of compelling the State to take the deferred payment of it in Revenue Bond Scrip? A. Yes.

"Q. Did you happen to know whether the Revenue Bond Scrip had any value in the market? A. I don't know.

"Q. It has not? A. I don't know that it has.

"Q. You know Alexander? A. Yes; I have never seen him personally.

"Q. You know him as a poor man? A. Yes.

"Q. Had he and Mr. Wesley no use for this property that you know of except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money.

"Q. Mr. Wesley holds a large block of Revenue Bond Scrip? A. Yes."

(2) Plaintiffs in error thus state their second point:

"Be it remembered that at the close of the testimony in this case the defendants entered a motion to dismiss the complaint on the plea to the jurisdiction of the Court contained in the second defenses set up in the answers of the defendants herein, and on the evidence introduced to sustain the plea. The defendants contended that they were mere custodians and care-

takers of the premises, not in possession or having any interest therein, and were not proper parties to the suit; and that this cause was, in effect, a suit against the State of South Carolina. The Court overruled the motion to dismiss the complaint, and held that this cause was not, in effect, a suit against the State of South Carolina, and that the defendants were proper parties, and that the Court had jurisdiction."

ARGUMENT.

First Exception:

The testimony referred to was properly excluded upon two grounds:

(1) The action being one on the law side of the Court, matters of equitable cognizance could not have been considered.

(2) That even if the testimony offered had tended to prove fraud and conspiracy, the defendants showed no authority from the State of South Carolina to vindicate her in the matter, and were mere volunteers, not in a position to avail themselves of such defenses.

In Field vs. Seabury, 60 U. S., 654 Law Ed., 19 How., 323-333, it was held: "This case involves directly the point whether, when a grant or patent for land or legislative confirmation of titles to land has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness between grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant.

"We are not aware that such a proceeding is permitted in any of the Courts of law. In England a bill in equity lies to set aside letters patent obtained from the King by fraud (Attorney General vs. Vernon, 1 Vernon, 277,370; the same case, 2 Ch. Rep., 553), and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee. But in neither could the patent be collaterally avoided at law for fraud. This Court has never declared it could be done."

Again, in Spencer vs. Lapsley (61 U. S., 906, L. C. P. Ed.) S. C., 20 How., 264-280, it is said: "In Hoofnagle vs. Anderson, 7 Wheat, 212, the Court says: 'It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation.' 'In Boardman vs. Reed, 6 Pet., 238, the defendants offered to prove that the lines were not run by a qualified surveyor; that the plats and certificates were made out by protraction, and had been surreptitiously returned to the Register's office and patents obtained.' The Court said 'that at law no facts behind the patent can be investigated. A court of law has concurrent jurisdiction with a court of equity in matters of fraud; but the defects of an entry and survey cannot be taken advantage of at law. The patent appropriates the land and gives the legal title to the patentee.' White vs. Burnley, 20 How., 235.

"So, if we were to consider the discrepancy of one day between the date of the preliminary order and the date of the certificate of the Secretary, and the absence of the Governor's signature, and the fact that one empresario consents for himself as an attorney for his partner, without adducing the power, and that the officers do not affix to their names the name of their respective offices, and that the survey must have been made before the order, and probably by a deputy or other person, as marks of irregularity or of malpractice, our opinion could not be affected. In Stevenson vs. Newnham, 16 L. and Eq., Baron Parke, in delivering the opinion of the Court of Exchequer Chamber, says: 'The effect of ordinary fraud is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance the property passes in the subject matter' and 'vests till avoided.' And this Court, after a full review of the subject, in Field vs. Seabury, 19 How., 324, stated the question and the answer applicable to this case. The question was: 'When a grant or patent for land, or a legislative confirmation of a title to land, has been given by the sovereignty or legislative author-

ity having the exclusive power to make it, without any provision having been made in the patent or by the law to inquire into its fairness, as between the grantor and grantee, or between third parties, can a third party raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the grant?' The reply of the Court is, we are not aware that such a proceeding is permitted in a court of law. * * * Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any commission to vindicate them from wrong. He is a volunteer.

"The doctrines of this Court do not favor such a litigant."

And in Providence Rubber Co. vs. Goodyear (76 U. S., 596, L. C. P. Ed.) 9 Wall., 788-804, the Court said:

"The subject was examined by Chancellor Kent with his accustomed fullness of research and ability, in Jackson vs. Lawton, 10 Johns., 23. He there said: 'Unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided in a regular course of pleading, in which the fraud, irregularity or mistake is regularly put in issue. The principle has been frequently admitted that the fraud must appear on the face of the patent to render it void in a court of law, and that when the fraud or other defect arises on circumstances, dehors the grant, the grant is voidable only by suit. 1 Hen. and Munf., 19, 187; 1 Munf., 134. The regular tribunal is chancery, founded on a proceeding by scire facias, or by bill or information.' The patent in that case was for land, but, as regards the point here under consideration, there is no distinction between such a patent and one for an invention or discovery. If there be, the case is stronger as to the latter. In the case of Field vs. Seabury, 19 How., 332 (60 U. S., XV., 654), the patent was also for land. This Court ruled the point in like manner, and the same remarks apply. Viewing the subject in the light of the principle involved, we can see no defect in the parallelism between that case and the one before us."

See also Polks Lessees vs. Wendell et al., 5 Wheat, 92 and U. S. vs. Arredondo et al., 6 Peters, 561.

The same rule prevails in the Courts of the State of South Carolina. In Duncan vs. Beard, 2 Nott and McCord, 405, the Court held:

"It is certain that where a grant has once passed the great seal, it cannot be revoked except by some legal proceedings, and this for the most obvious reason. The party may have it in his power to show a compliance with the condition or a release from the performance of it. (6 Comyn's Digest 63, letter D., 705 Com., 274, title patent). Despotic indeed would be the government which should exercise the power of revoking at will, all grants of land which it may have made to individuals, or of determining without the invention of a judicial tribunal, whether there was ground for a revocation. The usual mode in England is by scire facias in equity or by process on the law side of the Exchequer Court."

In 2 Foster Fed. Prac., p. 683, it is said: "The State practice will not be so far allowed as to permit an equitable defense to be pleaded in an action at common law."

It is, however, urged by counsel for plaintiffs in error, that there is, in this line of decisions, magic in the use of the term "The Great Seal" of the State, or Government, granting land, and that nothing is a "patent" in the sense in which the term is used which does not bear the impress of such seal, and that the immunity from collateral attack is due to the dignity of such a seal. We answer that it is due to the character of the transaction itself. Due to the fact that the Government granting its land to a private individual by any instrumentality or means prescribed by law, will regard the transaction as sacred until, by its duly appointed machinery, it takes steps to vacate the grant in a Court of Equity, where full justice can be done to all parties.

In the standard dictionary a "patent" is defined to be "an official certificate of a government grant. Letters patent, specifically, the instrument by which title to public lands in the United States is conveyed to individual holders." The term is sufficiently broad to describe any instrument authorized by law for the transfer of the Government property to individuals.

The rule is embodied in South Carolina in a statutory pro-

vision to the same effect, and the Attorney General is the only officer of the State who is authorized, under general enactment, to institute proceedings to avoid a grant. And under authority, found in Section 429 of the Code of Civil Procedure of 1882, as follows, to wit:

"Sec. 429. An action may be brought by the Attorney General in the name of the State for the purpose of vacating or annulling letters patent granted by the people of this State in the following cases:

"(1) When he shall have reason to believe that such letters patent were obtained by means of fraudulent suggestion or concealment of a material fact made by the person to whom the same were issued or made, or with his consent or knowledge."

But even the State of South Carolina herself could not have elected to rescind the transaction without tendering back the purchase money paid and offering to cancel the bond and mortgage which had been given. No such tender and offer were made either by the pleadings or by statement in evidence, and clearly no one not acting under express legislative authority would have had the right to determine for the State whether she would return this purchase money and cancel the bond and mortgage.

In The State vs. Pacific Guano Co., 22 S. C., at page 74, it is said: "When the State comes into her own Courts to assert a right of property, she is, of course, bound by all rules established for the administration of justice between individuals,"

No rule is better established than that one who seeks to rescind a transaction voidable for fraud or other reasons must first tender back the benefits he has received.

But further, the testimony offered and excluded disclosed the purpose of the parties to do only what they had the legal right to do, and, therefore, the transaction could not be made the basis of a charge of fraud, nor could it affect the issues involved in the cause.

If the Revenue Bond Scrip tendered was a valid obligation of the State of South Carolina, and receivable in payment of such dues as that for which it was tendered, the tender was proper and effective. If it was not valid, the right of the State could

in no wise be affected by it. She had one-third of the purchase money in cash, according to the terms of contract authorized by Act of the Legislature, and the bond and mortgage for the remaining two-thirds. This was a full compliance with the terms of sale.

The Second Exception:

See page 31 of printed record, covered by plaintiff's third assignment of error, page 33. This exception reads as follows:

"Be it remembered that at the close of the testimony in this case the defendants entered a motion to dismiss the complaint on the plea to the jurisdiction of the Court contained in the second defense set up in the answer of the defendants herein, and on the evidence introduced to sustain the plea, the defendants contended that they were mere custodians and care-takers of the premises, not in possession or having any interest therein, and were not proper parties to the suit, and that this case was, in effect, a suit against the State of South Carolina."

The Court overruled the motion to dismiss the complaint, and held that this cause was not, in effect, a suit against the State of South Carolina, and that the defendants were proper parties, and that the Court had jurisdiction.

The ruling complained of in this exception appears nowhere in the report of the trial of the case. It only appears in the bill of exceptions sealed by the Circuit Judge after an extension for three months, as will be seen at the top of page 30 of the printed record. And it is submitted that the exception is not well taken, not being founded upon anything which appears in the record.

In the recent decision of this Court in the case of Fowler vs. Lamson, M. S., No. 83, November Term, 1896, this Court ruled:

"It will be seen that there are no pleadings in the record; no evidence is returned; no exceptions to any decision of the Court are to be found; no request to the Court to find upon any Federal question; no refusal of the Court to find, and no finding upon any such question. Thus there is an entire absence in this whole record of any fact showing that the Supreme Court of Illinois or either of the lower Courts decided any Federal

question whatever. The assignment of errors alleged to have been made by the Illinois Supreme Court is unavailable for the purpose of showing any Federal question decided, where the record itself does not show that any such question was passed upon by the State Court. Missouri P. R. Co. vs. Fitzgerald, 160 U. S., 556-575 (40, 536-540).

"Where a case is brought to this Court on error or appeal from a judgment of a State Court, unless it appear in the record that a Federal question was raised in the State Court before the entry of final judgment in the case, this Court is without jurisdiction. Simmerman vs. Nebraska, 116 U. S., 54 (29, 535)."

It will, however, be observed that the question arose, not upon a motion for a non-suit, or a request for instruction to the jury, but upon a motion made to the Court to "dismiss the complaint" on the plea to the jurisdiction of the Court contained in the second defenses set up in the answer of the defendants herein, and on the evidence introduced to sustain the plea.

The South Carolina Code provides:

"Sec. 189. * * * * The allegation of new material in the answer not relating to a counter claim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

It also provides:

"Sec. 171. The defendant may set forth by answer as many defenses and counter claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both, they must each be separately stated and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished."

Under these provisions, then, the motion was clearly upon the allegation of new matter contained in the second defenses, which was, for the purposes of the trial, deemed controverted as if upon a direct denial by the plaintiff in the Circuit Court, and the merits of the new matter set out in the second defenses could only be judged of by the principles of pleading.

An examination will show that the second defenses contained no denials of any of the allegations of the complaint. And it is a principle well established under Code practice that

each defense, separately stated, must be judged of by the allegations and denials contained in the statement itself, and it cannot be supported by reference to other defenses.

In Cohrs vs. Frazier, 5 S. C. Reports, at page 355, it was ruled: "Where more than one matter of defense is set up in an answer, the sufficiency of each is to be tested by its own intrinsic force in the accomplishment of the end which it proposes."

In Mobley vs. Cureton, 6 S. C., 68, it was ruled: "Matter set forth by way of defense, whether of a legal or equitable nature, in an answer, and not amounting to a counter claim, are by the ~~claim~~ cause deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.'"

If the question had been presented on a motion for a nonsuit it would have been the duty of the Court below to have determined whether there was any evidence on the part of the plaintiff in the Circuit Court to establish the refusal of the defendants to yield the possession demanded. Or if the question had been presented in the shape of a request for instruction to the jury, it would have been the duty of the Court to have given appropriate instructions embodying the law in such a case. But being presented on a motion to dismiss the complaint, the Court could only consider the question in the shape it was left by the pleadings themselves. It would not be according to the law of jury trials after the introduction of testimony by the defendant which was controverted by the testimony offered by the plaintiffs, to pass upon the weight of the testimony, and for the Court itself to dismiss a complaint upon the ground that the testimony offered by the defendants had proven the sufficiency of the plea.

On the pleadings, then, how was the question presented? The second paragraph of the complaint alleges the title and possession in the plaintiff in the Court below of the premises. The third paragraph proceeds as follows:

"3. That the plaintiff being so possessed thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff, and that the defendants are, and ever since the said 20th day of February, 1892, have been in possession of said premises, and have been, and still are withholding the same from the plaintiff, although the plaintiff

has demanded from the defendants the possession thereof, to the damage of the plaintiff $10,000."

Defendants' second defenses, upon which alone the motion to dismiss the complaint were based, contain no denial of any of the allegations of the complaint; and as to the sufficiency of this second defense, it is to be decided as if every allegation of the complaint had been specifically admitted. The state of facts, as established by the pleadings, was that the defendants admitted that on the 20th of February, 1892, the plaintiff in the Court below had been in possession of the property, and that they, the defendants, wrongfully entered into said premises and ousted the plaintiff, and that they were, at the trial, and ever since the 20th day of February, 1892, had been in possession of said premises, and had been and still were withholding the same from the plaintiff, although the plaintiff had demanded from them the possession thereof. But they were claiming that on said 20th day of February, 1892, they were, and had since continued to be the Secretary of State and the guardian of the property, and that the premises described in the complaint on that day were, and had since continued to be the property, and in possession of the State of South Carolina, and in actual public use, and admitting the custody of the building. How could the Court, upon these pleadings, as matter of law, conclude that the custody of the property was rightfully in the State of South Carolina?

But the evidence had created an issue which could only be determined by the jury.

The testimony for the plaintiff in the Court below was as follows, page 9, printed brief:

"At what time did you make the demand of the defendants for the possession of the property? A. We made demand on the day of the service of the summons and complaint in this action, 13th February, 1893, having prepared the papers. The former action had been commenced and discontinued, and having prepared the papers for this action, I went to the building, and found there the defendant, J. R. Boyles, in possession, and I told him that we were about to commence an action for the possession of the property, and demanded possession, in the name of Mr. Wesley, stating to him that Mr. Alexander had

conveyed the property to Mr. Wesley, and offered to exhibit the deed. He told me that it was no use to show him the deed; he had instructions from the Secretary of State, Mr. Tindal, to refuse possession, and he would not deliver the possession. I went immediately to Mr. Tindal's office and found him there, and told him in substance what I had told Mr. Boyles and stated that Mr. Boyles had refused to deliver the possession of the building or the grounds; that he had ordered him to hold the possession, and Mr. Tindal assented to that, and then I made a formal demand of him. He refused to deliver possession, and said he was required to hold it for the Sinking Fund Commission. We had some further conversation about the matter, and he said he was holding it as Secretary of State, and as such would refuse to deliver the possession."

And the same witness, upon being recalled, testified, page 14 of brief:

"Q. State again the conversation you had with Mr. Tindal. A. On the day this action was commenced, before we put the papers in the hands of the deputy marshal for service, I went down to the building itself. I found Mr. Boyles, the defendant, in possession of the building, and I told him I had come down to demand possession of the building. He told me he was there in the custody of the building, under the instructions of the Secretary of State, and that he was instructed not to give up the possession of the building to me, and I would have to see the Secretary of State. I went immediately to his office, having had some trouble in the first case about the matter, and I told him of my conversation and Mr. Boyles' statement to me that he was holding the property under the instructions of the Secretary of State. He said he had stated the matter correctly; that he was instructed by the Commissioners of the Sinking Fund to hold that property as the property of the State of South Carolina, and he couldn't give the possession of the property to me; that he held it as agent of the Board of the Sinking Fund Commissioners for the State of South Carolina."

If that testimony was true, and it was for the jury to decide as to its truth, when the witness went there he found the defendant, Boyles, in possession. Boyles refused to deliver pos-

session, and stated to witness that he had been ordered by the defendant, Tindal, to hold the possession. Tindal himself said he was required to hold it for the Sinking Fund Commission, and that he was holding it as Secretary of State, and as such would refuse to deliver the possession. Defendant Boyles said he was instructed not to give up the possession. This was clearly a withholding of possession of property that belonged to the plaintiff, and whether the withholding was justified or not, depends upon whether the plaintiff had title to the property or not. It is not a case of the character of those cited by counsel for plaintiffs in error, where one who happens to be on the property, but in no way charged with the custody or care of it, is sued for its possession. Every action for possession embraces not only a right on the part of the plaintiff to the possession, but a withholding on the part of the defendant. And if one happens to be merely upon the property—but there is no withholding of possession by such an one—no right of action exists in favor of the plaintiff. But if there be a withholding of possession, it is at the risk of the party withholding, and can only be justified by showing that he had a right to withhold it.

However, since the case of U. S. vs. Lee, 106 U. S., 172 (L. C. P., Co. Ed.) it cannot be doubted that the mere claim of one in possession of real estate to hold it as a public officer for and on behalf of his government is not sufficient to oust the Courts of jurisdiction in an action to recover the possession of the property.

In that case, quoting the language of Chief Justice Marshall in another case, it is said: "It certainly can never be alleged that a mere suggestion of title in a State to property in possession of an individual must arrest the proceedings of Courts and prevent their looking into the suggestion and examining the validity of the title." Then proceeding, the Court says: "These decisions have never been overruled. On the contrary, as late as the case of Davis vs. Gray, 16 Wall, 204 (83 U. S., XXI., 447), the case of Osborn vs. Bank is cited with approval as establishing these among other propositions:

"'Where the State is concerned, the State should be made a party, if it can be done. That it cannot be done, is sufficient

reason for the omission to do it, and the Court may proceed to decree against the officers of the State, in all respects as if the State were a party to the record.

"'In deciding who are parties to the suit, the Court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as a real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.'

"This examination of the cases in this Court establishes clearly the result: That the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the Court, has been overruled and denied in every case where it has been necessary to decide it; and that in many others, where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the Court here; though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that, during all this period the Court has held the principle to be unsound, and in the class of cases like the present, represented by Wilcox vs. Jackson, Brown vs. Huger and Grisar vs. McDowell, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well considered decisions."

Again, the same principle was held in the recent case of Stanley vs. Schwalby et al., 147 U. S., 259 (L. C. P. Co. Ed.), decided 6th February, 1893. This, like the case at bar, was an action of trespass to try title. The defendants "pleaded not guilty, and specially that they held lawful possession of the property, as officers and agents of the United States."

The Court say: "In these cases he is not sued as an officer of the government, but as an individual, and the Court is not ousted of jurisdiction because he asserts the authority of such

officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included United States vs. Lee, 100 U. S., 196 (27, 171), where the action of ejectment was held to be in its essential character an action of trespass, with the power in the Court to restore the possession to the plaintiff as part of the judgment, and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this Court held to be unlawful, and therefore insufficient as a defense."

On the second appeal in the same case, Stanley vs. Schwalby, No. 653, October Term, 1895, the Court reaffirmed the principles here decided and say:

"The validity of the authority exercised by the defendants, as officers of the United States, depends, according to the decision in United States vs. Lee, 106 U. S., 196-205, upon the question whether the United States had, or had not, a good title in the land."

It is true that in that case it was held that that action could not be maintained because, in the first place, in its very character, it was a suit to determine the title of the United States to a portion of the land in question, and the judgment did ~~not~~ affirm such title to the extent of one-third of the land, and adjudged the title of another one-third to be in the claimant. But such decision was not intended as a modification of the principles which are now contended for, for the Court says that that principle was as much recognized in the first decision as in the second. It says: "It is a fundamental principle of public law, affirmed by a long series of decisions in this Court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any Court, without express authority of Congress."

The case at bar was a mere possessory action; the judgment went only for the possession (printed brief, page 27), and affected no one not a party to the cause. The State had filed a suggestion in the cause objecting to the jurisdiction of the Court, and brought the question up to this Court by writ of error. This Court ruled in this case, State of South Carolina, Plaintiff in

Error, vs. E. B. Wesley, 155 U. S., 542-545 (Law Edition, page 254), as follows:

"2. Where the State was not a party to the record in the Circuit Court, and did not become a party by intervention, but expressly refused to submit its rights to the jurisdiction of the Court, the writ of error brought by the State will be dismissed.

"3. The Circuit Court should not arrest proceedings in a suit for the possession of land to which the State is not a party, upon the mere suggestion of the Attorney General of the State that the land is occupied and possessed through an officer of the State who is the custodian of the same, and used by the State for public uses, where such averments were not either proven or admitted."

The Court said:

"In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. United States vs. Peters, 9. U. S., 5 Cranch, 115 (3, 53); The Exchange vs. McFadden, 11 U. S., 7, Cranch, 116 (3, 287); Osborn vs. Bank of United States, 22 U. S., 9 Wheat, 738 (6, 204); United States vs. Lee, 106 U. S., 196 (27,171); Stanley vs. Schwalby, 147 U. S., 508 (37, 259)."

WM. H. LYLES,
Counsel for Defendant in Error.

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BRIEF OF PLAINTIFFS IN ERROR, IN REPLY.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 231.

J. E. TINDAL and J. R. BOYLES, Plaintiffs in Error,

vs.

EDWARD B. WESLEY, Defendant.

ON THE RETURN TO THE WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SAMUEL W. MELTON,
Counsel for Plaintiffs in Error.
WILLIAM A. BARBER AND
HENRY N. OBEAR,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 231.

J. E. TINDAL and J. R. BOYLES, PLAINTIFFS IN ERROR,

vs.

EDWARD B. WESLEY, DEFENDANT.

BRIEF OF ARGUMENT FOR PLAINTIFFS IN ERROR IN REPLY:

On the Return to the Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

SAMUEL W. MELTON, Counsel for Plaintiffs in Error.
WILLIAM A. BARBER and HENRY N. OBEAR, of Counsel.

In the statement, counsel for defendant in error asserts that upon the execution of the deed to Alexander, he "had been put into possession of the property by the Commissioners." An order for delivery of the premises was delivered to Alexander's attorney, signed by Mr. Means, a clerk of the Secretary of State. His authority was denied and was not proved. The Commissioners of the Sinking Fund, who alone had power to surrender possession, repudiated the order, and instructed the watchman to refuse possession. It appears from the evidence that this was done, when demand was eventually made. The property, meantime, continued in the actual, peaceable possession of the State; and so continues to this day.

In his brief, pages 6-11, counsel for the defendant in error insists that the deed in question—the Commissioners of the Sinking Fund to Alexander—cannot be impeached for fraud in a common law action, and quotes authorities applicable only to "Letters Patent."

We reiterate that this deed is not a patent. The estate in question is not in the category known as "public lands," or "public domain," as granted in the name of the State, signed by the Governor, countersigned by the Secretary of State and attested by the great seal of the State.

The property was sold at auction by the Commissioners of the Sinking Fund, under a power conferred by special statute, for a special purpose. It runs in the name of the Commissioners, and not in the name of the State; and is signed by the Commissioners, with their private seal, in the presence of two witnesses. It is not signed by the Governor or countersigned by the Secretary of State, as in "Letters Patent"; and does not bear the great seal of the State.

In Anderson's Law Dictionary, a patent from the United States is defined to be "a conveyance by which the nation passes the title to portions of the *public domain*." In 19 Ency. of Law, 347, it is said: "Every patent is signed by the President." See also 350-351. In the States it is necessary that the Governor should sign it, and that the great seal of the State be affixed. *Ib.*, 353; *Rice* v. *Minnesota*, 1 Black, 360; and 9 Cranch, 99; 5 Wheat., 303; 11 Wheat., 388.

"They are called *patent* because they have the great seal, exposed to open view, pendent at the bottom": Burrill, Dic.

Objection is now taken for the first time to an alleged deficiency in the record, in that the ruling as to the jurisdiction appears nowhere in the report of the trial of the

case (defendant's brief, pages 11-12). The ruling, it is said, "appears only in the bill of exceptions sealed by the Circuit "Judge after an extension for three months; and it is sub- "mitted that the exception is not well taken, not being "founded upon anything which appears in the record." The only authorities cited are authorities in cases of error to State Courts; not applicable in all respects to cases of error to Circuit Courts of the United States.

This matter appears not only in the Bill of Exceptions, but in the assignment of errors, both of which are parts of the "Record." Counsel copies on page 11 of his brief the first paragraph of the second exception in the Bill; but *omits all reference to the second paragraph*, which reads as follows:

"Thereupon, the defendants by their counsel, at the time "excepted to the ruling of the Court; and tendered this their "second bill of exception, which they prayed may be signed, "sealed and made a part of the record, which is accordingly "done.

"CHARLES H. SIMONTON, [L. S.],
"Circuit Judge.

"Filed 24th July, 1894."

The trial was in April, 1894. It appears in the Record that on the 2d of May, 1894, an order for extension of time was granted in the following words:

"The attorney for the defendants having given notice of "exceptions to the rulings of the trial Judge on the admis- "sion of testimony in the cause, on the motion for a non- "suit, and on the plea to the jurisdiction of the Court,

"Ordered: That they have until the first day of August, "1894, to make and file their bill of exceptions with the "Clerk of this Court.

"2d May, 1894.

"CHARLES H. SIMONTON,
"Circuit Judge.

"Filed 2d of May, 1894."

"The report of the trial," by the stenographer, has of itself no verity. The ruling and exceptions must appear upon the record by bill of exceptions made part of the record: *Claason* v. *United States*, 142 U. S., 140."

"Minutes of the Judge, or clerk, or notes of the stenographer cannot take the place of a bill of exceptions; but are only memoranda by the aid of which one may afterwards be drawn up: *Hanna* v. *Maas*, 122 U. S., 24; *Pomeroy* v. *Bank*, 1 Wall., 592; *Thomison* v. *Riggs*, 5 Wall., 663; *Young* v. *Martin*, 8 Wall., 354; *Ins. Co.* v. *Lanier*, 95 U. S., 171."

Hanna v. *Maas*, *supra*: "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a Court of error. The excepting counsel, in order to entitle himself to such revision, must not only allege exceptions at the trial, but he must afterwards draw up and hand to the presiding Judge those exceptions in writing, stating distinctly and specifically the rulings and instructions of which he complains: *Turner* v. *Yates*, 16 How., 14, 29; *Ins. Co.* v. *Sea*, 21 Wall., 158."

The motion to dismiss the action for want of jurisdiction was made at the close of the testimony, upon the evidence relating to the second defense.

A motion to dismiss on this ground is always in order. It may be made at any time during the trial; or after judgment; or in the appellate Court; and is always addressed as an issue of law to be heard and decided by the Court—the Court passing upon the facts as developed either by the pleadings or by evidences or both. This is the universal practice in the Courts of this country and in England.

In *Reed* v. *Morrison*, 37 S. C., 413, 415, it is said: "We are met *in limine* with the question of jurisdiction. This question may be raised at any time during the trial of a case:

State v. *Penny*, 19 S. C., 233. Unlike other questions, it may be raised for the first time in this Court: *Bell* v. *Fludd*, 28 S. C., 615; *Hardin* v. *Trimmier*, 30 S. C., 391. And the Court, *sua sponte*, may raise it; *Pool* v. *Brown*, 12 S. C., 557; *Adkins* v. *Moore*, 43 S. C., 173.

But these propositions need no citations of authority; they are elementary.

The record does not disclose any objection to the consideration of this motion, as based upon the second defense and upon the evidence taken in support of it. The evidence was taken without objection. Without further discussion of the propositions submitted on pages 12-13 of the brief of defendant in error, we insist that the objection comes too late. The evidence was before the trial Judge—competent and relevant; and is now part of the record before this Court. It cannot now be expunged or disregarded.

The evidence relied on to establish the facts as to the relations of the defendants to the property is uncontradicted. Whether upon these facts, they were proper parties to the action is purely a question of law. So, the facts are clearly established upon which is based the question of law whether this is in effect a suit against the State. There were no disputed questions of fact to be solved; and it was the duty of the Court then and there to entertain the motion and decide the issues involved. To this decision we have regularly assigned error; and the question, we submit, is properly before this Court for revision.

If it be held otherwise, however, we submit that this Court will nevertheless subject the issues to revision *upon its own motion*: *Parker* v. *Ormsby*, 141 U. S., 81; *Denni* v. *Pironi*, *id.*, 123; *Corlando* v. *Turck*, 150 U. S., 138.

"Whether a Circuit Court of the United States has or has not jurisdiction of the case, is a question which the Supreme Court must examine and determine, even if the parties forbear to make it, or consent that the case be considered on the merits: *Morris* v. *Gilmore*, 129 U. S., 315;

Chapman v. *Barney*, *id.*, 677; *Cameron* v. *Hodges*, 127 U. S., 322; *Higler* v. *Faulkner*, *id.*, 482; *Metcalf* v. *Watertown*, 128 U. S., 586; *King* v. *Otoe*, 120 U. S., 225; *Pepper* v. *Fordyce*, 119 U. S., 469."

The general denial is not repeated in the second defense, which we submit, contains all the averments of fact necessary to a perfect defense in bar of the action on the ground of want of jurisdiction in the Circuit Courts; while the absence of the general denial in the second does not avoid the effect of the general denial as contained in the first defense.

There is no authority for the proposition that the omission to repeat the general denial in the second defense operates to admit the allegations of the complaint. But if it be admitted, what of it? If every averment of the complaint be true, we submit that this would not prevent the full effect of the defense as a bar of the plaintiff's action. Whatever be the fact as to possession and *ouster*, it is clear that at the commencement of the action the possession was not in the plaintiff below; else the suit could not have been instituted.

The alleged defect seems to be deemed a matter of substance. If so, then it should have been met by the general demurrer. If a matter of form, the plaintiff's only recourse was the motion to "make the defense more definite and certain." Neither was done. The plaintiff below went to trial without any objection to the defect; and therefore must be deemed to have waived it: Pomeroy, Rem., Secs. 590-609.

Moreover, plaintiff not only thus waived all formal objection to the pleading, but made no objection to the introduction of evidence by the defendants below, which effectually establishes the facts upon which their second defense is now based. With great deference, we submit that this Court will revise this case upon the record as it stands.